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United States and Chilean Claims Commission.

Established by virtue of the Convention of May 24, 1897, to revive the Convention of August 7, 1892.

MINUTES OF THE COMMISSION.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1901.

Convention between the United States of America and the Republic of Chile to revive the Convention of August 7, 1892, to adjust amicably the claims of citizens of either country against the other. Signed at Washington, May 24, 1897. Ratification with amendment advised by the Senate, February 28, 1899. Ratified by the President, March 1, 1899. Ratified by the President of Chile. Ratifications exchanged, March 12, 1900. Proclaimed, March 12, 1900.

The Convention between the United States of America and the Republic of Chile, signed August 7, 1892, having expired, and the Commission thereunder established to adjust amicably the claims made by the citizens of either country against the Government of the other having failed, through limitation, to conclude its task, leaving certain claims duly presented to the said Commission unadjudicated, the Government of the United States of America and the Government of the Republic of Chile, desiring to remove every cause of difference in the friendly relations that happily exist between the two Nations, have agreed to revive the said Convention of August 7, 1892, and for that purpose have named as their Plenipotentiaries, to wit:

The President of the United States of America, the Honorable John Sherman, Secretary of State of the United States; and

The President of the Republic of Chile, Señor Don Domingo Gana, Envoy Extraordinary and Minister Plenipotentiary of Chile in the United States of America:

Who have agreed upon the articles following:

ARTICLE I.

The High Contracting Parties agree to revive the Convention of August 7, 1892, between the United States of America and the Republic of Chile, and that the Commission

thereunder created shall be allowed for the transaction of its business a period of four months, to be reckoned from the day of its first meeting for business, and conforming, in other respects, with the provisions of the second paragraph of Article VIII of the said Convention. Nevertheless, if the period of four months before stipulated shall prove insufficient for the settlement of the claims, the Commissioners are authorized to extend, at their discretion, such period to one or two months more.

It is expressly stipulated that this article shall in no wise extend or change the period designated by the first paragraph of Article VIII of the said Convention for the presentation of the claims; so that the new Commission shall be limited to considering the claims duly presented to the former Commission in conformity with the terms of the Convention and with the Rules that governed its labors, excepting claim No. 7, of the North and South American Construction Company, which was subsequently withdrawn, a direct and final settlement thereof having been arrived at by the interested parties.

ARTICLE II.

The present Convention shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by the President of the Republic of Chile, with the approbation of the National Congress thereof, and the ratifications shall be exchanged at Washington, at as early a day as possible.

In testimony whereof we have signed the present Convention in the English and Spanish languages, in duplicate, affixing thereto our respective seals, the Plenipotentiary of Chile declaring that he signs the same "*ad referendum*."

Done at the city of Washington, the 24th day of May in the year of Our Lord eighteen hundred and ninety-seven.

JOHN SHERMAN. [L. S.]
DOMINGO GANA. [L. S.]

Convention between the United States of America and the Republic of Chile, for the settlement of certain claims of the citizens of either country against the other. Signed at Santiago August 7, 1892. *Ratification advised by the Senate December* 8, 1892. *Ratified by the President of the United States December* 16, 1892. *Ratifications exchanged January* 26, 1893. *Proclaimed January* 28, 1893.

The United States of America and the Republic of Chile, animated by the desire to settle and adjust amicably the claims made by the citizens of either country against the government of the other, growing out of acts committed by the civil or military authorities of either country, have agreed to make arrangements for that purpose, by means of a Convention, and have named as their Plenipotentiaries to confer and agree thereupon as follows:

The President of the United States of America, Patrick Egan, Envoy Extraordinary and Minister Plenipotentiary of the United States at Santiago, and the President of the Republic of Chile, Isidoro Errázuriz, Minister of Foreign Relations of Chile;

Who, after having communicated to each other their respective full powers, found in good and true form, have agreed upon the following articles:

ARTICLE I.

All claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Chile, arising out of acts committed against the persons or property of citizens of the United States not in the service of the enemies of Chile, or voluntarily giving aid and comfort to the same, by the civil or military authorities

of Chile; and on the other hand, all claims on the part of corporations, companies, or private individuals, citizens of Chile, upon the Government of the United States, arising out of acts committed against the persons or property of citizens of Chile, not in the service of the enemies of the United States, or voluntarily giving aid and comfort to the same, by the civil or military authorities of the Government of the United States, shall be referred to the Commissioners, one of whom shall be named by the President of the United States, and one by the President of the Republic of Chile, and the third to be selected by mutual accord between the President of the United States and the President of Chile. In case the President of the United States and the President of Chile shall not agree within three months from the exchange of the ratifications of this Convention to nominate such third Commissioner then said nomination of said third Commissioner shall be made by the President of the Swiss Confederation.

ARTICLE II.

The said Commission, thus constituted, shall be competent and obliged to examine and decide upon all claims of the aforesaid character presented to them by the citizens of either country.

ARTICLE III.

In case of the death, prolonged absence or incapacity to serve of one of the said Commissioners, or in the event of one Commissioner omitting, or declining, or ceasing to act as such, then the President of the United States, or the President of the Republic of Chile, or the President of the Swiss Confederation, as the case may be, shall forthwith proceed to fill the vacancy so occasioned by naming another Commissioner within three months from the occurrence of the vacancy.

ARTICLE IV.

The Commissioners named as hereinbefore provided shall meet in the city of Washington at the earliest convenient time within six months after the exchange of ratifications of this convention, and shall, as their first act in so meeting, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment and according to public law, justice, and equity, without fear, favor, or affection, all claims within the description and true meaning of Articles I and II, which shall be laid before them on the part of the Governments of the United States and of Chile, respectively; and such declaration shall be entered on the record of their proceedings; Provided, however, that the concurring judgment of any two Commissioners shall be adequate for every intermediate decision arising in the execution of their duty and for every final award.

ARTICLE V.

The Commissioners shall, without delay, after the organization of the Commission, proceed to examine and determine the claims specified in the preceding articles, and notice shall be given to the respective Governments of the day of their organization and readiness to proceed to the transaction of the business of the Commission. They shall investigate and decide said claims in such order and in such manner as they may think proper, but upon such evidence or information only as shall be furnished by or on behalf of the respective Governments. They shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the respective Governments in support of, or in answer to, any claim, and to hear, if required, one person on each side whom it shall be competent for each Government to name as its Counsel or Agent to present and support claims on its

behalf, on each and every separate claim. Each Government shall furnish at the request of the Commissioners, or of any two of them, the papers in its possession which may be important to the just determination of any of the claims laid before the Commission.

Article VI.

The concurring decisions of the Commissioners, or of any two of them, shall be conclusive and final. Said decisions shall in every case be given upon each individual claim, in writing, stating, in the event of a pecuniary award being made, the amount or equivalent value of the same in gold coin of the United States; and in the event of interest being allowed on such award, the rate thereof and the period for which it is to be computed shall be fixed, which period shall not extend beyond the close of the Commission; and said decision shall be signed by the Commissioners concurring therein.

Article VII.

The High Contracting Parties hereby engage to consider the decision of the Commissioners, or of any two of them, as absolutely final and conclusive upon each claim decided upon by them, and to give full effect to such decisions without any objections, evasions, or delay whatever.

Article VIII.

Every claim shall be presented to the Commissioners within a period of two months reckoned from the day of their first meeting for business, after notice to the respective Governments as prescribed in Article V of this Convention. Nevertheless, where reasons for delay shall be established to the satisfaction of the Commissions, or of any two of them, the period for presenting the claim may be extended by them to any time not exceeding two months longer.

The Commissioners shall be bound to examine and decide upon every claim within six months from the day of their first meeting for business as aforesaid; which period shall not be extended except only in case of the proceedings of the Commission shall be interrupted by the death, incapacity, retirement, or cessation of the functions of any one of the Commissioners, in which event the period of six months herein prescribed shall not be held to include the time during which such interruption may actually exist.

It shall be competent in each case for the said Commissioners to decide whether any claim has, or has not, been duly made, preferred, and laid before them, either wholly, or to any and what extent, according to the true intent and meaning of this Convention.

Article IX.

All sums of money which may be awarded by the Commissioners as aforesaid, shall be paid by the one Government to the other, as the case may be, at the capital of the Government to receive such payment, within six months after the date of the final award, without interest, and without any deduction save as specified in Article X.

Article X.

The Commissioners shall keep an accurate record and correct minutes or notes of all their proceedings, with the dates thereof; and the Governments of the United States and of Chile may each appoint and employ a Secretary versed in the languages of both countries, and the Commissioners may appoint any other necessary officer or officers to assist them in the transaction of the business which may come before them.

Each Government shall pay its own Commissioner, Secretary and Agent or Counsel, and at the same or equivalent rates of compensation, as near as may be, for like officers on

the one side as on the other. All other expenses, including the compensation of the third Commissioner, which latter shall be equal or equivalent to that of the other Commissioners shall be defrayed by the two Governments in equal moieties.

The whole expenses of the Commission, including contingent expenses, shall be defrayed by a ratable deduction on the amount of the sums awarded by the Commissioners, provided always that such deduction shall not exceed the rate of five per centum on the sum so awarded. If the whole expenses shall exceed this rate, then the excess of expense shall be defrayed jointly by the two Governments in equal moieties.

Article XI.

The High Contracting Parties agree to consider the result of the proceedings of the Commission provided for by this Convention as a full, perfect and final settlement of any and every claim upon either Government within the description and true meaning of Articles I and II; and that every such claim, whether or not the same may have been presented to the notice of, made, preferred or laid before the said Commission, shall, from and after the conclusion of the proceedings of the said Commission, be treated and considered as finally settled, concluded and barred.

Article XII.

The present Convention shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof and by the President of the Republic of Chile, with the consent and approbation of the Congress of the same, and the ratifications shall be exchanged at Washington, at as early a day as may be possible within six months from the date hereof.

In testimony whereof the respective Plenipotentiaries

have signed the present Convention, in the English and Spanish languages, in duplicate, and hereunto affixed their respective seals.

Done at the city of Santiago the seventh day of August, in the year of our Lord one thousand eight hundred and ninety-two.

[SEAL.] PATRICK EAGAN.
[SEAL.] ISIDOR ERRAZURIZ.

FIRST SESSION.

WASHINGTON, D. C., *June* 15, 1900.

The Commissioner of the Swiss Confederation, J. B. Pioda; the Commissioner of the United States of America, William G. Gage, and the Commissioner of the Republic of Chile, Carlos Morla Vicuña, appointed under the Convention between the United States and the Republic of Chile to adjust amicably the claims of citizens of either country against the other, signed at Washington, May 24, 1897, and proclaimed March 12, 1900, met, pursuant to arrangements, at the office of the Secretary of State, in the city of Washington, June 15, 1900, at eleven o'clock A. M., and having exhibited to each other their credentials in their behalf, did, as their first act, make and subscribe, respectively, a solemn declaration as provided in said Convention. The declarations so made are in the words and figures following, to wit:

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,
WASHINGTON, *June* 15, 1900.

The Commissioners appointed pursuant to the Convention between the United States of America and the Republic of Chile, signed May 24, 1897, to revive the Convention of August 7, 1892, to adjust amicably the claims of citizens of either country against the other, that is to say, William G. Gage, a citizen of the State of Michigan, the Commissioner named by the President of the United States; Carlos Morla Vicuña, a citizen of the Republic of Chile, the Commissioner named by the President of that Republic, and J. B. Pioda, a citizen of the Swiss Confederation, the Commissioner named by the President of that Confederation, met this day in the presence of the Honorable John Hay, Secretary of

State of the United States, at the Department of State, in the city of Washington, and made and subscribed the following declaration :

We, the undersigned Commissioners, appointed in pursuance of a Convention signed May 24, 1897, between the United States of America and the Republic of Chile, to revive the Convention of August 7, 1892, to adjust amicably the claims of citizens of either country against the other, do severally and solemnly declare that we will impartially and carefully examine and decide to the best of our judgment and according to public law, justice and equity, without fear, favor, or affection, all claims within the description and true meaning of Article 1 of said new Convention which shall be laid before us on the parts of the Governments of the United States and of Chile, respectively.

In witness whereof we have, this fifteenth day of June, one thousand nine hundred, made and subscribed this our solemn declaration.

J. B. PIODA,

Commissioner appointed by the President of the Swiss Confederation.

WILLIAM G. GAGE,

Commissioner appointed by the President of the United States.

C. MORLA VICUÑA,

Commissioner appointed by the President of the Republic of Chile.

DEPARTMENT OF STATE,
WASHINGTON, *June* 15, 1900.

I certify that the above declaration was signed at the Department of State this fifteenth day of June, one thousand nine hundred

In witness whereof I have hereunto set my hand and caused the seal of the Department of State to be affixed.

[SEAL.] JOHN HAY.

Thereupon, after the subscribing of the foregoing solemn declaration, the Honorable J. B. Pioda was elected President of the Commission by acclamation.

On motion of the Honorable William G. Gage, the Commissioner of the United States, Mr. J. H. Perry was recognized as the Agent and Counsel and Mr. John F. Baker as the Secretary on the part of the United States.

On motion of the Honorable Morla Vicuña, the Commissioner of Chile, Mr. Aníbal Cruz was recognized as the Agent and Counsel and Mr. Elidoro Infante as the Secretary *ad interim* on the part of Chile. His motion was supplemented with the statement that upon the arrival of Mr. Enrique Balmaceda the latter should be recognized as the Secretary.

The Honorable William G. Gage moved that the Secretaries be instructed to procure offices for the future sessions of the Commission and all the necessary appurtenances, such as a safe, stationery, furniture, typewriters, etc. Adopted.

On motion of the Honorable Morla Vicuña, it was

"*Ordered:* That the Agents of the United States and Chile be instructed to prepare a draft of rules for the guidance of the deliberations of the Commission, said draft to be submitted thereto at its next meeting." He suggested that the Agents be authorized to obtain from the Department of State the papers necessary to be printed.

Whereupon Mr. Gage offered the following resolutions, which were adopted:

"*Ordered:* That the Agents of the High Contracting Parties select such of the memorials, exhibits, and proofs as in their judgment should be printed for the purposes of the Commission, and that the Secretaries cause the documents so selected to be printed."

"*Ordered:* That the State Department of the United States Government be requested to permit the Secretaries of the Commission to withdraw from its archives the documents referred to in the preceding order for the purpose therein specified."

"*Ordered:* That when any paper is printed for the use of the Commission, fifty copies thereof shall be set apart and kept for ultimate deposit with the State Department of the United States Government."

On motion of Mr. Gage it was ordered to take a recess until November 15th, at which time the rules should be presented to the Commission and the first business day would be fixed for the meeting of the Commission.

On Mr. Gage's suggestion it was ordered that quarters be selected for the Commission not later than October first, from which date the rent would be payable. The Commission then took a recess until November 15th, at ten o'clock A. M., when they will meet at the offices of the Commission, No. 1413 G street N.W.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

SECOND SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,
WASHINGTON, D. C., *November* 15, 1900.

The Commission met at 10 o'clock A. M., pursuant to the recess taken on the 15th of June, 1900.

Present: The Honorable J. B. Pioda, the Commissioner named by the Swiss Confederation, presiding; the Honorable William G. Gage, Commissioner on the part of the United States; the Honorable C. Morla Vicuña, Commissioner on the part of the Republic of Chile; the Honorable John H. Perry, Agent on the part of the United States; the Honorable Aníbal Cruz, Agent on the part of Chile; Mr. John F. Baker, Secretary on the part of the United States, and Mr. Enrique Balmaceda, Secretary on the part of Chile.

The Honorable President delivered a short address congratulating the members upon the favorable auspices under which they had reconvened, and that they had been chosen to take part in the proceedings of a commission appointed to arbitrate differences between the governments of the two friendly Republics, parties to the Convention of May 24, 1897.

He also expressed the hope and belief that the proceedings of the Commission would be conducted in the spirit of amity and justice, in which the Convention itself was conceived, and that the result of their deliberations would be such that the cause of peaceful arbitration of international disputes would be promoted and advanced among civilized nations.

The minutes of the previous meeting were read and approved.

On motion of the Honorable Mr. Vicuña, the thanks of the Commission were extended to Mr. Infante for his services as Secretary for Chile since the organization of the Commission.

On motion of the Honorable Commissioner for Chile, Mr. Enrique Balmaceda was recognized as the Secretary on the part of Chile.

On motion of the Agent for Chile, Mr. Strobel was recognized as the Assistant Counsel for Chile.

On motion of Mr. Perry, it was ordered that a stenographer and typewriter be employed at a salary of not more than $100 a month. The Secretaries were authorized to make the appointment.

The Agent on the part of the United States presented a draft of the rules for the regulation of the Commission. He argued that this was a new Commission and not a continuation of the old Commission. The Agent on the part of Chile opposed the adoption of new rules and moved that the rules of the last Commission be accepted by the Commission. He offered the following resolutions:

"Whereas in the last meeting of the Commission established by the Convention of August 7, 1892, on April 9, 1894, on motion of the Agent of the United States it was agreed that 'all cases presented to but not finally determined by the Commission be remitted to the respective governments of the United States and Chile for such disposition as they may hereafter agree upon'; and

"Whereas the Commission adopted said motion in view of the facts stated in said motion as follows: 'There are still pending claims of the citizens of either country against the other country in which evidence has not been completed under the rules of the Commission, and other cases are pending in which the United States has completed the testimony and closed the cases, but in which Chile has not yet completed the testimony, and other cases in which both countries have closed but not submitted, and other cases

which have been closed and submitted, which said cases time will not permit this Commission to hear and consider'; and

"Whereas the treaty between the United States and Chile of May 24, 1897, as a result of the above, states that 'the Convention between the United States of America and the Republic of Chile, signed August 7, 1892, having expired, and the Commission thereunder established to adjust amicably the claims made by citizens of either country against the Government of the other having failed through limitation to conclude its task, leaving certain claims duly presented to said Commission unadjudicated,' both countries agreed to revive the said Convention of August 7, 1892; and

"Whereas the said Convention of May 24, 1897, allows to the Commission for the transaction of its business a period of four months, authorizing the Commissioners to extend such period to one or two months more; and

"Whereas in the last paragraph of Article 1 of said Convention of May 24, 1897, it is clearly stated that 'the new Commission shall be limited to considering the claims duly presented to the former Commission in conformity with the terms of the Convention (of 1892) and with the rules that governed its labors.'

"Therefore, it is declared that the new Commission created by the Convention of May 24, 1897, must be considered as a continuation of the Commission created by the Convention of August 7, 1892, and that the rules of January 5, 1894, which governed the labors of the Commission created by the Convention of August 7, 1892, shall be adopted by this Commission, with the additional provision that each case shall be continued from the stage in the proceedings in which it was left by the former Commission, excepting that any case which was argued but not decided shall be reargued before the present Commission."

The Commission thereupon went into executive session to consider the arguments presented by the Agents.

Upon the reassembling of the Commission, the Honorable President stated that the Commission had decided to adopt its own rules, and would therefore proceed to the consideration of the rules presented by the Agent of the United States.

After considerable discussion relative to the rules, the Honorable President, Mr. Pioda, moved that the entire matter be again referred to the Agents, with the instruction to agree upon, if possible, and report a set of rules for the guidance of the Commission at its next meeting, having in consideration that the Commission desires to finish its duties, if possible, within the four months allowed by the Convention, and if not within that time, then within the one to two months more allowed by said Convention, and that the claims are to be taken up in the condition in which they were left by the prior Commission.

Thereupon the Honorable Commission adjourned to meet on Friday, November the sixteenth, at ten A. M.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

THIRD SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION.

WASHINGTON, D. C., *November* 16, 1900.

The session was called to order at 10 o'clock A. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, and the Agents and Secretaries on the part of the United States and Chile.

The minutes of the previous session were read and approved.

On motion of the Commissioner for the United States, it was

"*Ordered:* That the Secretaries be authorized to audit and order the payment of all contingent accounts, such as rent, furniture, stationery, printing, safe, repairs of desks, typewriter, clerks, translators, messenger, etc."

The Secretary for the United States informed the Commission that in accordance with instructions, the Secretaries had appointed a stenographer and typewriter for the Commission at a salary of $100 a month.

The Agent for the United States premising that officially he must take exception to the ruling of the Commission that the cases are to be considered as coming before it in the same condition in which they were left by the prior Commission, yet, inasmuch as it had been so ordered, he would report that the Agents were agreed upon a set of rules in conformity with the order in question, a draft of which rules he then submitted; said rules as so reported were, after certain amendments by the Commission, adopted as follows:

Rules of the Commission for the Settlement of Claims under the Convention of May 24, 1897, *between the United States of America and the Republic of Chile.*

I.

The claims covered by the above designated Convention shall be entered in a docket provided for the purpose in their numerical order as numbered in the docket of the prior Commission.

II.

All the entries in the prior docket shall be copied into the new docket, and the claims shall be deemed to come to this Commission in the same condition as they were left by the prior Commission.

III.

Memorials may be amended at any time before final submission upon leave granted by the Commission; but such amendment shall not include a new or different cause of action.

IV.

If the claim has been preferred through an agent or legal representative, his authority so to do must be shown to the satisfaction of the Commission in accordance with the laws of the country under which he is appointed.

V.

The respondent Government in cases already closed by the United States shall complete its proofs within seventy-five days after the date of the adoption of these Rules.

The claimant in cases not closed by him shall complete his proofs within the same length of time; and after the

claimant announces that his proofs are complete, the respondent Government must complete its testimony within seventy-five days also. The Commission will allow testimony in rebuttal if necessary.

VI.

Testimony may be taken by deposition with or without written interrogatories. The party desiring to take it shall give at least ten days' notice thereof to the opposing party if taken within the United States and thirty-five days' notice if taken outside of the United States, stating particularly the place and time of taking the same, the names and residences of the witnesses intended to be examined, and the subject of the examination. The adverse party may appear and cross-examine. After the deposition has been completed either party may take the deposition of such other witnesses in that vicinity, as were discovered after the date of the notice aforesaid, first giving notice thereof—accompanied by the above mentioned particulars—to the local attorney or representative of the opposing party, and to the opposing party also if possible, and the same officer shall take such further testimony. The notice last above referred to shall be given as soon as the party taking the deposition or his representative learns of the witness and shall be given at least twenty-four hours in advance. Each witness shall state whether he has any interest direct, indirect or contingent in the claim in controversy, and if so what, and whether he is connected in business with, or anywise related to, the claimant.

Depositions may be taken by any officer competent so to do under the law of the place where taken. He shall first swear (or affirm) the witness to tell the truth, the whole truth, and nothing but the truth relative to the cause in which he is about to testify. He shall then write the questions desired, following each with the answer of the witness thereto, giving in every instance the exact words of the

latter. If the attorney or agent of either party make any suggestions to the witness under examination as to his answer, the officer shall note the suggestion in the deposition. As soon as completed the witness shall subscribe his deposition and write his name on the margin of each sheet containing any part of it.

The officer shall give the title of the case in the caption of the deposition, and note the time and place of taking the same, together with the names of the attorneys or agents appearing for the several parties. At the conclusion of the deposition he shall certify over his official signature and seal (if he have one)—furnishing evidence of his official character with his certificate that the witnesses were duly sworn (or affirmed) as required in this rule before being examined; that he wrote the questions and answers which they severally gave thereto, and that he saw them sign the deposition, and that it was taken at the time and place specified in the caption. When the deposition shall have been completed and authenticated as aforesaid, he shall forthwith enclose the same in an envelope or packet, on which, after being duly sealed, he shall endorse the title of the case and the names of the witnesses examined, and having addressed the same to the Commission at Washington, D. C., deposit it in the proper post-office duly stamped. When received by the Commission it may be opened by the Secretaries at the request of either party.

VII.

The Commission may at any time authorize additional testimony to be taken, and may also, on motion or of its own accord, require any claimant or witness to appear personally before it for examination or cross examination.

Leading questions must not be put to a witness by the party calling him, and the officer who takes the deposition, while noting all objection of counsel, shall not pass upon the

same, but shall record the questions and answers as if unobjected to.

VIII.

On motion, any testimony, or paper filed as testimony, or any other matter, that is improper, incompetent, immaterial, or scandalous, will be stricken from the record. Objections to the notice for depositions, or to the form and manner of taking or returning the same, must be made in writing, and filed within one week after notice of the filing of the deposition, or they will be considered as waived.

IX.

The competency, relevancy, and effect of evidence and validity of memorials shall be determined by the Commission with reference to the convention under which it is created, the laws of the two nations, the public law, these rules, and the rules under which the evidence was produced or the memorials filed.

X.

When an original paper on file in the archives of either Government cannot be conveniently withdrawn, a duly certified copy may be received in evidence in lieu thereof. Public official documents, laws, orders, and decrees, published by authority of either Government, may be received in evidence, subject to objection as to relevancy and effect without further authentication.

XI.

Motions, briefs, and arguments shall be in the English language. All depositions which may be taken under these rules shall be taken in the language which the witness ordinarily uses, and if in any language other than the English,

a faithful translation into English shall be provided as soon as possible after the evidence reaches the Commission. All documentary evidence shall be submitted in the original language in which it is written, and if in Spanish, shall be accompanied by a faithful translation into English.

XII.

All pleadings, motions, and briefs of counsel of the respective Governments shall be printed at the expense of the Commission, together with such other documents as in their judgment may be necessary.

XIII.

The order and mode of procedure which obtain in the courts of justice of both countries will be observed in proceedings before the Commission, so far as practicable and consistent with the convention and these rules.

XIV.

The Secretaries shall keep a record of the proceedings of the Commission in a book provided for the purpose for each day of its session, which shall be read at its next meeting, and if no objection be made, or when corrected, if correction be needed, it shall be approved and subscribed by the President of the Commission and counter-subscribed by the Secretaries.

They shall keep a notice book, in which entries may be made by the counsel for either Government, of which entries notice shall be forthwith given to the opposing counsel by one of the Secretaries.

They shall provide a book of printed forms, under the direction of the Commission, in which shall be recorded its several awards or decisions signed by the Commissioners concurring therein.

They shall be the custodians of the papers, documents, and books of the Commission, and shall keep the same safe and in methodical order.

Upon each paper filed with the Commission they shall indorse the date of filing and enter a minute thereof in the docket, and they shall make brief memoranda in such docket under each case of all orders of the Commission pertaining thereto. While affording every reasonable opportunity to parties or their counsel to inspect, copy, or make extracts from papers and records, they shall permit none to be withdrawn from the files of the Commission or taken from its office except by its direction duly entered of record.

XV.

The docket, minutes of proceedings, and record of awards or decisions shall be kept in duplicate, both in English and Spanish, one of which duplicates shall be delivered to each Government at the close of the Commission.

XVI.

The Commission will for sufficient cause suspend or modify any of the requirements of the foregoing rules, and will, upon reasonable cause being shown, extend the time for pleading, argument, or taking evidence in any case.

On motion of the Agent for Chile it was

"*Ordered:* That 100 copies of the old rules and 200 copies of the new rules be printed in English and Spanish."

On motion of the Honorable Commissioner for the United States it was

"*Resolved,* That the memorials, pleadings, and evidence in the cases to be brought before this Commission, under its rules, be treated as refiled with this Commission as of the 18th day of December, A. D. 1900."

On motion of the Honorable Commissioner for Chile, the

country against the other, concluded May 24, 1897, have directed us, on their behalf, to inform your Excellency that at a meeting of the Commission held at Washington on the sixteenth day of November, 1900, the following order was adopted:

"*Ordered:* That in conformity with Article 5 of the original Convention, the Secretaries give notice to the respective Governments that the Commissioners, on the fifteenth day of June, 1900, signed the declaration required by Article 4; that they took recess until the fifteenth day of November, 1900, and again until the following day, when they adopted a body of rules for the regulation of their proceedings; that they have fixed the eighteenth day of December, 1900, as the day of their first meeting for business, on which day they will be ready to proceed with the performance of the duty with which they are charged."

We beg, therefore, to accordingly advise you of this action of the Commission.

In witness whereof we have hereunto set our hands and caused the seal of the Commission to be affixed.

JOHN F. BAKER,
Secretary on the part of the United States.

[SEAL.] ENRIQUE BALMACEDA,
Secretary on the part of Chile.

FIFTH SESSION.

OFFICES OF THE

UNITED STATES AND CHILEAN CLAIMS COMMISSION.

WASHINGTON, D. C., *December* 19, 1900.

The Commission assembled at three o'clock P. M.

Present: The Honorable J. B. Pioda, presiding; the Honorable Commissioners, and the Agents and Special Counsel and the Secretaries on the part of the United States and Chile.

The minutes of the previous session were read and after certain corrections approved.

The Agent for the United States moved that in case No. 12, Michael O'Brien and James H. Kimball *v.* Republic of Chile, further testimony be taken from Mr. O'Brien. The Agent for Chile opposed this motion. The Commission then went into executive session. The result of its deliberations, as announced by the President, was as follows:

"The proof in this case being closed by the Agent of the United States before the prior Commission, and this case coming before this Commission in the state in which it was left by the prior Commission according to Article 2 of this Commission's rules, and according to Article 7 of the said rules, this Commission can authorize at any time additional testimony to be taken, and O'Brien's deposition having already been taken before the prior Commission, and this being a closed case, the majority of this Commission is of the opinion that the motion that a new deposition from O'Brien be taken be not allowed."

The Agent for the United States wanted to know that if in case Mr. Kimball came to Washington would his testimony be accepted by the Commission.

He could not promise to produce the witness but had made an effort to do so. The Commission confirmed the agreement already taken on the 18th, and agreed to accept the Kimball testimony.

Maritime risk for 217 days at the rate of 8 per centum per annum on value of £60,000....	£2,893 6 8
Cost of cablegrams, legal fees, and miscellaneous expenses in the United States.....	1,400 0 0
Loss of use by reason of absence of steamer from September 1, 1891, to November 10, 1891, thus preventing the company from making four voyages, which, corresponding to conditions of trade, estimated at £2,500 per voyage, according to the books of the company, is.....	10,000 0 0
	£44,051 13 4

Page 6 of the memorial, as amended, will read the same as now, with the exception of total amount prayed for in line 2 of paragraph 5, which is changed from £46,551 16s 8d to £44,051 13s 4d.

It was ordered that 100 copies of the amended memorial be printed and to be so designated.

On motion of the Honorable Commissioner for Chile, the following rule was adopted:

"In the oral argument of any matter pending, the party having the affirmative thereof shall have the opening and shall be followed by the party having the negative, to which the party having the affirmative may reply; the party having the negative shall thereupon close the argument, presenting matters only which are in reply to any new matter presented by the party for the affirmative in his closing argument.

"No further oral argument shall be made by either side except by the consent of the Commissioners."

The Agent for the United States discussed the cases pending for adjudication. He claimed that case No. 1, being the case of the Central and South American Telegraph Company, in so far only as item No. 6 therein was concerned, should be included in the list of cases pending

before this Commission, and argued at length in support of his contention. The Special Counsel for Chile presented his views in opposition. The Special Counsel for the United States was heard and also the Agent for Chile. The Commission reserved its decision.

A recess was taken from 12 M. until 2 P. M.

Upon reassembling, the Agent for Chile submitted the following resolution in connection with the consideration of case No. 3, Henry Chauncey *v.* Republic of Chile:

"Whereas it is the intention of the respondent Government to raise the question of jurisdiction of this Commission in this case under the treaty, as a matter of convenience for the Commission and the Counsel, it is

"*Ordered:* That the arguments on point of jurisdiction be heard and decided alone as soon as practicable."

The Agent for the United States objected to the resolution, and the Commission granted him until 5 P. M., December 19th, as the necessary time within which to file his written objections.

The Agent for the United States asked leave to file a supplemental memorial in case No. 3, Henry Chauncey *v.* Republic of Chile, which leave was granted by the Commission, there being no objection on the part of the Agent for Chile, notwithstanding the fact that this case was closed, submitted, and argued before the prior Commision.

The Agent for Chile is allowed to file evidence in case No. 3, Henry Chauncey *v.* Republic of Chile.

The Agent for the United States desired to introduce more testimony in connection with case No. 12, Michael O'Brien and James H. Kimball *v.* Republic of Chile, which had been closed by the claimant before the prior Commission. To this the Agent for Chile objected.

The Commission considered this question in executive session, and ordered that the deposition of Kimball, if desired, might be taken in Washington, D. C., but not in San Francisco.

The Agent for the United States notified the Commission that he desired to take more evidence and some depositions in Washington, D. C., in case No. 25, Andrew Moss *v.* Republic of Chile, in accordance with the terms of the decision rendered by the prior Commission.

No objections were made to the filing of documentary evidence in cases Nos. 26 and 31, Henry Chauncey *et al.*, and Grant Walker *et al.* *v.* Republic of Chile.

In case No. 32, George W. L. Mayers *v.* Republic of Chile, the Agent for the United States demanded that the Agent for Chile produce certain documents, known as nitrate certificates, now in the possession of the Government of Chile, which he desired to use in evidence. The Agent for Chile stated that the certificates were either destroyed or cancelled. The Agent for the United States was satisfied with that answer to his request. The Agent for Chile insisted that the claimant in this case, or very recent power of attorney from said claimant, be presented to the court.

The Commission asked the Agent for the United States if there is a claimant in case No. 32, George W. L. Mayers *v.* Republic of Chile, to which the Agent for the United States replied that he had no information on this question except the papers on file and the power of attorney to Heber J. May from Mr. Mayers, which he presented to the Commission. The special counsel for the United States was heard. After an executive session the Commission rendered the following decision:

"In this case, it appearing to the Commission, by evidence filed on the part of the respondent Government, that it contends that the claim has been paid by it and the nitrate certificates mentioned in the memorial surrendered to it on or about October 9, 1897; and it further appearing that it is uncertain whether the claimant desires further to prosecute his claim; and it appearing to the Commission that it is necessary to ascertain this fact before taking up the case

in the regular order, and the Honorable Agent for the United States having very kindly offered to ascertain this fact and whether any power of attorney has been given by the claimant since October 9, 1897, for the prosecution of the said claim, the Commission request the Honorable Agent for the United States to ascertain these facts and report to the Commission."

The Agent for the United States stated that he would do so.

Whereupon the Commission, at 6.30 P. M., adjourned until 3 P. M., December 19th.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

FIFTH SESSION.

OFFICES OF THE

UNITED STATES AND CHILEAN CLAIMS COMMISSION.

WASHINGTON, D. C., *December* 19, 1900.

The Commission assembled at three o'clock P. M.

Present: The Honorable J. B. Pioda, presiding; the Honorable Commissioners, and the Agents and Special Counsel and the Secretaries on the part of the United States and Chile.

The minutes of the previous session were read and after certain corrections approved.

The Agent for the United States moved that in case No. 12, Michael O'Brien and James H. Kimball *v.* Republic of Chile, further testimony be taken from Mr. O'Brien. The Agent for Chile opposed this motion. The Commission then went into executive session. The result of its deliberations, as announced by the President, was as follows:

"The proof in this case being closed by the Agent of the United States before the prior Commission, and this case coming before this Commission in the state in which it was left by the prior Commission according to Article 2 of this Commission's rules, and according to Article 7 of the said rules, this Commission can authorize at any time additional testimony to be taken, and O'Brien's deposition having already been taken before the prior Commission, and this being a closed case, the majority of this Commission is of the opinion that the motion that a new deposition from O'Brien be taken be not allowed."

The Agent for the United States wanted to know that if in case Mr. Kimball came to Washington would his testimony be accepted by the Commission.

He could not promise to produce the witness but had made an effort to do so. The Commission confirmed the agreement already taken on the 18th, and agreed to accept the Kimball testimony.

The Agent for the United States stated that he would obtain a written statement in regard to the desire of the claimant to press the sixth claim of case No. 1, Central and South American Telegraph Company *v.* Republic of Chile, if the Commission so desired.

In case No. 32, George W. L. Mayers *v.* Republic of Chile, the Agent for the United States stated that he had sent to Mr. May and asked for the information desired.

The attorney had documents which he wished to file in case No. 25, Andrew Moss *v.* Republic of Chile, that did not relate to the points referred to in the decision of the last Commission. The Agent asked permission of the Commission to file these documents, and take the deposition of a witness here in Washington.

The Agent for Chile stated that he made no objections. The Commissioner for Chile suggested that the rules regarding the taking of testimony in closed cases should not be violated.

The Agent for Chile desired that as to the deposition the matter be postponed until the Agent for the United States should inform the court as to the kind of evidence he would produce, to which the Agent for the United States agreed.

As to the documentary evidence it was agreed that it might be introduced.

In case No. 3, Henry Chauncey *v.* Republic of Chile, the Agent for the United States in accordance with the instructions of the Commission at the previous session presented his written argument in opposition to the motion of the Agent for Chile for a separate argument on the question of jurisdiction.

Thereupon the Commission took a recess until 3 P. M. December 20th.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

SIXTH SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,

WASHINGTON, D. C., *December* 20, 1900.

The Commission was called to order at three o'clock P. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, and the Agents for the United States and Chile, the Special Counsel for the United States, and the Secretaries on the part of the United States and Chile.

The minutes of the previous session were read and after some minor amendments approved.

In case No. 3, Henry Chauncey *v.* Republic of Chile, the Agent for Chile read and filed his written answer to the argument filed on the 19th by the Agent for the United States.

After an Executive Session the Commission made the following statement:

"The Commission reserves for a future session the declaration of its decision on the motion of the Agent for Chile concerning the point of treating separately the question of jurisdiction from the merits of the case in No. 3, Henry Chauncey *v.* Republic of Chile."

The Commission then desired to hear further from the Agent for the United States as to the requirements in other cases coming before this Commission.

The Agent for the United States thereupon took up case No. 25, Andrew Moss *v.* Republic of Chile, and advanced reasons why the deposition of Mr. Charles Hunt was important. The Agent for Chile objected. The Commissioner for Chile in accordance with Article II of the Rules was opposed to the taking of any cumulative evidence. The

Commissioner for the United States considered that the Hunt deposition would come within the spirit of Article VII of the Rules and should be permitted to be taken.

The Honorable President was anxious that the character of the testimony proposed for Mr. Charles Hunt be made known to the Commission before its decision was given. After a clear statement from the Agent for the United States as to the testimony expected from Mr. Charles Hunt, the Commission made the following decision:

"The Commission rules that the claimant may take the deposition of Charles Hunt in Washington, but only upon matters which are substantial and pertinent and not cumulative of any substantial or pertinent evidence already in the case but new."

The Commissioner for the United States is, however, of the opinion that the proposed deposition of Mr. Hunt should be allowed to be taken.

The Commission thereupon adjourned until 10.30 o'clock A. M., December 21st.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

SEVENTH SESSION.

OFFICES OF THE

UNITED STATES AND CHILEAN CLAIMS COMMISSION,
WASHINGTON, D. C., *Dec.* 21, 1900.

The Commission met at 10 o'clock A. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agents for the United States and Chile, the Special Counsel for the United States, and the Secretaries on the part of the United States and Chile.

The minutes of the previous session were read and approved.

The Agent for Chile informed the Commission that in the event the Commission should not grant the motion made by him in case No. 3, Henry Chauncey *v.* Republic of Chile, he would present a demurrer in this case on the ground that this Commission had no jurisdiction under the Treaty.

The Agent for the United States asked leave to file an amended memorial in case No. 33, Julia L. Williams *v.* Republic of Chile. The Agent for Chile objected, and gave reasons for his position. This occasioned a lengthy discussion of the Williams and Robinson cases, No. 33. The Commission reserved its decision.

The Agent for the United States desired to file an amended memorial in case No. 41, Mauricio Levek *v.* Republic of Chile, the language of which he stated would be an improvement over that of the old memorial, but did not include a new or different cause of action, although it included a substantial increase in the amount of money demanded under the old cause of action. The Agent for Chile stated his objections. The Commission reserved its decision.

In case No. 42, Peter Bacigalupi *v.* Republic of Chile, the Agent for the United States desired to introduce docu-

mentary evidence and take the deposition of Mr. Bacigalupi either in San Francisco or Washington. The Agent for Chile objected.

Permission was granted the Agent for the United States to file documentary evidence in this case, but the Commission reserved its decision on the question of taking the deposition of the claimant.

The following statement was made by the Agent of the United States:

"In No. 27, Trumbull *v.* The United States, before the old Commission, the Agent for the United States does not admit that the case is pending or within the jurisdiction of of this Commission. He simply makes no claim either way on the subject. He reserves the right to raise these questions if he so desires at a later day, and after further deliberation on the subject."

The Agent for Chile thought the position assumed by his colleague was not a correct one, and urged the Commission to insist that the Agent for the United States define his position as soon as possible.

The Commission thereupon adjourned until 3.30 P. M., December 22d.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

EIGHTH SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,

WASHINGTON, D. C., *December* 22, 1900.

The Commision met at 3.30 o'clock P. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agent for Chile, the Special Counsel for the United States, and the Secretaries on the part of the United States and Chile.

The minutes of the previous session were read and approved.

The Commission rendered the following decisions:

"The Commission have considered the application of the Honorable Agent for the United States for permission to take the deposition of the claimant, Peter Bacigalupi, in case No. 42, and, inasmuch as the Honorable Agent cannot state the character of the proposed testimony, and the claimant has already given evidence in the case in the form of a lengthy affidavit, the Commission hold that the application is governed by the ruling made in similar cases, and therefore denies the application."

"The Commission has in the case No. 27, Trumbull *v.* The United States, decided to order the Agent for the United States to report to this Commission as soon as possible whether he will or not raise the question of jurisdiction or introduce a demurrer to that effect in this case, and in the event of his raising that question, to state the date when he will do so, and introduce the demurrer stating the ground thereof, giving this information at the same time to the Agent for Chile for communication to the claimant."

The Commission asked the Agent for Chile to state his objections to the filing of an amended memorial in case No. 33, Julia L. Williams *v.* Republic of Chile.

The Agent for Chile stated his objections at some length, to the effect that the case was not now before the Commission.

The Special Counsel for the United States, in reply, called attention to the precedents in such cases and to the fact that the former Commission had not fixed any time before adjournment within which said amendment should have been made, and no motion had been entertained to remove the case from the docket for failure to amend, consequently the case had come before the Commission in the same condition in which it was left by the former Commission.

The Agent for Chile replied that a demurrer having been confessed by the Agent for the United States and sustained by the Commission, the case after this step could be considered as duly presented. Furthermore he called the attention of the Commission to the fact that the claimant had never filed a new memorial before the prior Commission.

Upon the conclusion of the argument, the matter was taken under advisement by the Commission.

The Commission then adjourned until 10.30 o'clock A. M., January 8, 1901.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

NINTH SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,

WASHINGTON, D. C., *January* 8, 1901.

The Commission met in Executive Session at 10.30 o'clock A. M.

The regular session was called to order at 3.30 o'clock P. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agent for Chile, the Special Counsel for the United States, and the Secretaries on the part of the United States and Chile.

The minutes of the previous session were read and approved.

The Commission made the following rulings:

Upon Item No. 6 in case No. 1, the Central and South American Telegraph Company *v.* the Republic of Chile, the majority of the Commission decided that this Commission had full jurisdiction in the premises.

In case No. 3, Henry Chauncey *et al. v.* the Republic of Chile, the Commission decided that the question of jurisdiction should be considered alone, before the case is taken up on its merits.

In case No. 41, Mauricio Levek *v.* Republic of Chile, the motion to amend the memorial was denied.

In case No. 33, Julia L. Williams *v.* Republic of Chile, the Commission decided that the claimant should be allowed to amend the memorial.

In case No. 27, Ricardo L. Trumbull *v.* United States, upon the suggestion of the Honorable President, the Special Counsel for the United States was instructed to obtain in-

formation and report to the Commission at the next meeting what attitude would be assumed by the United States on the question of jurisdiction.

The Agent for Chile in case No. 3, Henry Chauncey *v.* Republic of Chile, submitted in writing the points which he wished to discuss upon the question of jurisdiction.

In case No. 32, Geo. W. L. Mayers *v.* the Republic of Chile, the Commission ordered that the Special Counsel for the United States make a definite statement at the next meeting as to whether or not this claim will be prosecuted.

The Agent for Chile begged to inform the Honorable Commission that although the attorney in the Moss case (No. 25), Mr. May, was given permission only to examine Mr. Hunt upon substantial and pertinent matters which might be new, yet he, the Agent for Chile, took no advantage of this restriction, and not only made no objection to Mr. May questioning the witness freely upon all the points he desired, but expressly allowed him to make such full examination, which was done.

In regard to the Bacigalupi case, No. 42, the Honorable Commissioner for Chile stated that since Mr. Bacigalupi had only filed an affidavit before the last Commission, both the Agent for Chile and himself would accept Mr. Bacigalupi's deposition in Washington, notwithstanding the fact that the Commission had decided that no deposition would be allowed in this case, which had been closed. The Special Counsel for the United States did not know whether he desired to take the deposition as the case had been closed. He would inform the Commission at the next meeting if the representatives of the United States desired this deposition.

In the Chauncey and Walker cases, Nos. 26 and 31, the Agent for Chile called the attention of the Commission to the fact that he had objected to the filing of three or four affidavits in these cases on the ground that the permission granted to the Agent for the United States was for the filing of documentary evidence.

The Commission adjourned until 10.30 o'clock A. M., January 15th.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

TENTH SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,
WASHINGTON, D. C., *January* 15, 1901.

The Commission met at 10.30 A. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agent for Chile, the Special Counsel for the United States, and the Secretaries on the part of the United States and Chile.

The minutes of the previous session were read and approved.

It was ordered that the fact be placed on record that the United States and Chileans Claims Commission attended in a body the function given by the President of the United States at the Executive Mansion, and the breakfast reception tendered by the Secretary of State at his residence on January 1, 1901.

The Special Counsel for the United States moved that the evidence in the Chauncey case, No. 26, might be considered in the Walker case, No. 31, and *vice versa*, to which the Agent for Chile assented. Adopted.

The Bacigalupi case, No. 42, was taken up. Whereupon the Agent for Chile asked to have the following statement placed on record:

"In case No. 42, Peter Bacigalupi *v.* The Republic of Chile, the Agent for Chile desires to place on record the fact that every facility has been afforded by the respondent Government to the claimant for the purpose of enabling him to produce his deposition in the proper and legal way; and if such deposition is not produced the claimant is solely responsible for the consequences of such failure."

The Honorable Commissioner for Chile, during the discussion, endorsed the above statement.

The Special Counsel for the United States stated he had ascertained, since the last session, that upon the Commission's decision on December 21st, denying the permission to take Mr. Bacigalupi's deposition, this fact had been immediately communicated to the claimant; that the case was thereafter closed, and that at this late date circumstances had so changed that it was no longer convenient to take the deposition. Moreover, that it was properly within the province of the Counsel for the United States and not of the Commissioner or Agent for Chile to make any further requests in this direction. He objected to the statement of the Agent for Chile being recorded.

The Agent for Chile gave his reasons for desiring to have his position properly set forth on the records.

The Commissioner for the United States said that as the Commission had refused to allow taking of the Bacigalupi deposition he did not see how the Agent for Chile could ask that it be now taken unless he desired to take it himself.

The Commission, after an Executive Session, ordered that the statement of the Agent for Chile, as above noted, be placed on record.

The Honorable President laid before the Commission a communication from the Agent of the United States, in which he stated that in the Trumbull case, No. 27, he would not be able to decide whether or not to raise the question of jurisdiction until January 22d. On account of illness the Agent for the United States had been unable to confer with the several parties interested in the case. The Commission ordered that the Agent for the United States notify the Secretaries for the United States and Chile, and the Agent for Chile, on or before January 22d as to his position on the question of jurisdiction in this case, and that the same should be recorded in the notice book of the Commission on or before the date herein mentioned

Case No. 32, George W. L. Mayers *v.* Republic of Chile, coming up, the Special Counsel for the United States desired to submit a letter from Mr. May, an attorney in the case. The letter was read. The Agent for Chile objected to the consideration of the document and insisted that the case be stricken from the docket. The Special Counsel for the United States suggested if such action were taken the words "without prejudice" should be added.

To this the Agent for Chile objected. Pending action by the Commission a recess was taken.

The Commission reassembled at 3.30 P. M.

The Agent for Chile again moved that the Mayers case, No. 32, be stricken from the docket. The Special Counsel for the United States submitted the following motion:

"Inasmuch as the United States State Department is the only depositary or court of record for the filing and giving notice to all parties in interest of powers of attorney, papers on file, etc., thereby protecting assignments of record in respect to claims of citizens of the United States against foreign governments; and

"Inasmuch as there was an assignment of record in favor of Heber J. May, in the claim of George W. L. Mayers *v.* Chile, prior to the settlement out of court of this claim without notice to the said May, the Special Counsel for the United States moves:

"That if this Commission, upon consideration of the statement of private counsel herewith submitted of the recent death of the claimant, should decide that the claim is no longer before the Commission and should order the case to be stricken from the docket, the words 'without prejudice' may be included in such a motion."

After an executive session the Commission rendered the following decision:

"It appearing to the Commission, from evidence filed by

the Republic of Chile, that the nitrate certificates upon which the foregoing claim is based have been paid by that Government, therefore, on motion for the Agent for Chile, it is

"*Ordered:* That the claim in said case be, and the same hereby is, dismissed."

The Agent for Chile suggested that the 30th day of January be fixed as the date upon which to take up the question of jurisdiction in the Chauncey case, No. 3. He announced that under the rules the seventy-five days will have expired on January 31st and that the following cases would be closed on that day: Nos. 33 (Robinson), 35 (Moore), 37 (Hallowes), and 40 (Dodge). He would close Nos. 8 (Leach), 26 (Chauncey), 30 (Prevost), 31 (Walker), and 41 (Levek) on the same date. He would be ready to take up the Levek case, No. 41, on February 5th.

The Agent for Chile stated that, although he would close the Trumbull case, No. 27, before January 31st, he might desire to file documentary evidence in respect to the power and status of the claimant's heirs after that date, if the Commission would permit him to do so. The Special Counsel for the United States said that there was no objection on the part of the United States. The motion was granted. It was stated that the attorneys for the United States and Chile would be prepared to argue the question of jurisdiction in case No. 3, Henry Chauncey *et al.* *v.* Republic of Chile, on January 30th.

The Commission adjourned until 10.30 o'clock A. M., January 30.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

ELEVENTH SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,
WASHINGTON, D. C., *January* 30, 1901.

The Commission was called to order at 10.30 o'clock A. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agents and Special Counsel for the United States and Chile, and the Secretaries on the part of the United States and Chile.

The minutes of the previous session were read and approved.

In case No. 3, Henry Chauncey *v.* The Republic of Chile, the motion of the Agent for Chile to dismiss the case for want of jurisdiction was taken up. The Special Counsel for Chile made the opening argument on the part of the respondent Government, after which the Commission took a recess until 2.30 o'clock P. M.

Upon reassembling the Agent for the United States made reply on behalf of his Government. He was followed by the Special Counsel for the United States. The Agent for Chile and the Special Counsel for Chile closed the argument. The Commision reserved its decision.

In the Dodge case, No. 40, the Agent for the United States stated that he had not been able to ascertain the whereabouts of the claimant, neither had the private attorney in the case. The Agent for Chile stated that as there was apparently no claimant the case could not be taken up. On his motion, and as a matter of courtesy, an additional two weeks from this date was allowed the Agent for the United States to pursue his investigation.

In the Levek case, No. 41, the Commission granted the

Agent for the United States permission to take the deposition of Mr. Levek in rebuttal.

The Commission then adjourned to meet at 10.30 o'clock A. M., January 31st.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

TWELFTH SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,
WASHINGTON, D. C., *January* 31, 1901.

The Commission met at 10.30 o'clock A. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agents and Special Counsel for the United States and Chile, and the Secretaries.

The minutes of the previous session were read and approved.

Case No. 8, Kate E. Leach *et al.* *v.* The Republic of Chile, having been closed by the Agent for Chile on January 30th, the Agent for the United States asked leave to introduce some testimony in rebuttal. The Commission granted his request.

The Commission, without making any assignments, adjourned to meet on February 8th, at 10.30 o'clock A. M.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

THIRTEENTH SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,
WASHINGTON, D. C., *February* 8, 1901.

The Commission assembled at 10.30 o'clock A. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agents and Special Counsel for the United States and Chile, and the Secretaries.

The minutes of the previous session were read and approved.

The Honorable President announced that a majority of the Commission had decided to dismiss case No. 3, Henry Chauncey *v.* The Republic of Chile, on the ground that this court had no jurisdiction over the claim. The Honorable Commissioner for the United States filed his written dissenting opinion in the said case.

It was agreed that case No. 31, Grant Walker *et al. v.* The Republic of Chile, would be argued on February 16th.

The following motion was submitted and taken under advisement by the Commission, after hearing the objection of the Agent for Chile, which was, in effect, that the motion should not be considered until the case came up for trial.

"HENRY CHAUNCEY *et al.*
v.
REPUBLIC OF CHILE. } No. 26.

"GRANT WALKER *et al.*
v.
REPUBLIC OF CHILE. } No. 31.

"And now comes the Agent for the United States, and, pursuant to the provision of Rule VIII, moves that the let-

ter of the Intendente of Atacama, dated at Copiapo, January 18, 1858, introduced in evidence by the Agent for Chile, in the above-entitled cases, and printed at page 61 of his printed proofs, be stricken from the record as improper, incompetent, and immaterial, in that the same relates to an occurrence which took place long after the matter referred to in the above-entitled claims, and has no connection or bearing upon that matter whatsoever. It relates simply to alleged ignorance of maritime usages displayed long after the principal event by a person connected with the event complained of. It cannot possibly serve any lawful end in the cases in which it is filed, and consists simply of criticisms of the personal conduct of the captain of the ship *Sportsman* on an occasion later than, and nowise connected with, the occasion referred to in those cases.

JOHN HOYT PERRY,
Agent for United States."

The Honorable President requested the Agents to announce at the next meeting the assignment of cases for the remaining sessions of the Commission.

The Agent for Chile expressed a desire that case No. 8, Kate E. Leach *et al.* *v.* The Republic of Chile, should be closed by the Agent for the United States as soon as possible.

The Commission adjourned to meet at 10.30 o'clock A. M., February 16th.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

FOURTEENTH SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,
WASHINGTON, D. C., *February* 16, 1901.

The Commission met at 10.30 o'clock A. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agents and Special Counsel for the United States and Chile, and the Secretaries.

The minutes of the previous session were read and approved.

The Agent for the United States read a private letter from the attorney in case No. 35, Austin D. Moore *v.* The Republic of Chile, in which the death of the Peruvian witness, whose deposition had been noticed for January 19th, was announced. He asked for further time in which to procure from other persons the desired evidence. The Agent for Chile objected. The Commission denied the application on the ground that sufficient time to accomplish what was desired did not remain.

The Agent for Chile moved that case No. 40, Wm. W. C. Dodge *v.* The Republic of Chile, be stricken from the docket, as neither the whereabouts nor the existence of the claimant could be ascertained. The Agent for the United States objected on the ground that the claimant was presumably alive and the claim still pending. The Commission reserved its decision.

Cases Nos. 26 and 31, Henry Chauncey *et al.* and Grant Walker *et al.* *v.* The Republic of Chile, were taken up. The opening argument was made by the Agent for the United States.

At 1 P. M. the Commission took a recess until 3 o'clock. Upon reassembling the Agent for Chile made an argument

on behalf of his Government. The discussion was closed by the Agent for the United States. The Commission reserved its decision.

The Agent for the United States stated that by agreement with the Agent for Chile the following cases would be ready for argument on the dates indicated: Levek case, No. 41, on February 23d; Prevost case, No. 30, on March 2d, and the Blodgett, Moss, Moore, and Bacigalupi cases, Nos. 14, 25, 35, and 42, respectively, on March 16th.

The Commission adjourned until February 23d, at 10.30 o'clock A. M.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

FIFTEENTH SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,
WASHINGTON, D. C., *February* 23, 1901.

The Commission met at 10.30 o'clock A. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agents for the United States and Chile, and Special Counsel for the United States, and the Secretaries.

The minutes of the previous session were read and approved.

The Commission rendered the following decision in case No. 26, Henry Chauncey *et al.* *v.* The Republic of Chile:

"The Commission consider that this case is governed by the decision of the case No. 3, Henry Chauncey *v.* The Republic of Chile, and the claim is therefore dismissed for want of jurisdiction, but without prejudice."

The following statement was given out by the Commission:

"In case No. 40, William W. C. Dodge *v.* The Republic of Chile, the Commission desire to allow as much time as possible to establish the fact whether the claimant is still alive or if there be heirs of the claimant who are citizens of the United States, and, therefore, as this case and Nos. 14, 25, 35, and 42 involve like questions which are to be heard before the Commission on the 16th of March, it is determined that the disposition of this case be postponed until those cases are disposed of."

Case No. 41, Mauricio Levek *v.* The Republic of Chile, was taken up. The Special Counsel for the United States made the opening argument.

A recess was taken from 12 o'clock until 2 P. M.

Upon reassembling the Agent for Chile argued at full length in behalf of the respondent Government.

The Special Counsel for the United States closed the discussion, submitting a supplemental brief on the admissibility and effect of affidavits and other *ex parte* writings.

The Commission reserved its decision and adjourned until 10.30 A. M., March 2d.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

SIXTEENTH SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,

WASHINGTON, D. C., *March* 2, 1901.

The Commission assembled at 10.30 o'clock A. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agents and Special Counsel for the United States and Chile, and the Secretaries.

The minutes of the previous session were read and approved.

The Agent for the United States stated that he had conferred with the Agent for Chile upon the subject of *ex parte* evidence, and both being about to file briefs on this question neither asked the Commission to decide that they would or would not be influenced by it in all the cases, but both of them desired the Commission to weigh each item of such evidence when offered, and give much, little or no weight to it as it might seem to deserve, all of which would be more fully set forth in the briefs.

Case No. 30, Henry S. Prevost and Charles A. Prevost *v.* the Republic of Chile, was taken up. The Agent for the United States opened the argument for the claimants.

The Special Counsel for Chile spoke for the respondent Government.

A recess was taken from 12.30 to 2 o'clock.

Upon reassembling the Honorable President announced that a majority of the Commission had decided to dismiss case No. 31, Grant Walker *et al. v.* the Republic of Chile, the Commissioner for the United States dissenting.

The Special Counsel for Chile resumed his argument and entered into a discussion of the merits of the case.

During this argument the Agent for the United States

asked for a ruling from the Commission as to whether public or official documents could be referred to for the first time in argument, as was then being done by Counsel, or if same had to be first filed as evidence in the case. The Commission reserved its decision.

The Special Counsel for Chile then resumed and concluded his argument, to which the Agent for the United States replied.

The Commission then adjourned to meet on March 23, at 10.30 A. M.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

SEVENTEENTH SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,

WASHINGTON, D. C., *March* 23, 1901.

The Commission met at 10.30 o'clock A. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agents and Special Counsel for the United States and Chile, and the Secretaries.

The minutes of the previous session were read and approved.

The case of Ricardo L. Trumbull *v.* The United States, No. 27, was submitted without argument, and the Agent for Chile moved that the claim be allowed.

The Commission awarded the claimant the sum of $3,000.

Decisions of the Commission were announced by the Honorable President in cases Henry S. Prevost and Charles A. Prevost *v.* The Republic of Chile, No. 30, and Mauricio Levek *v.* The Republic of Chile, No. 41, dismissing the first and awarding the claimant $5,000 in the second.

The Agent for Chile called the attention of the Commission to the filing of certain papers in the case of Kate E. Leach *v.* Republic of Chile, No. 8, by the Agent for the United States. He objected vigorously to a copy of "El Mercurio," dated 1862, which was not an official document.

The Agent for the United States and the Agent for Chile submitted, in writing, their views on this question.

The Commission reserved its decision.

The Agent for Chile desired to hear from the Commission in regard to the case of Wm. W. C. Dodge *v.* Republic of Chile, No. 40.

The Agent for the United States, being called upon for information concerning the aforesaid Dodge, stated that neither he nor the private attorneys had been able to ascertain whether the claimant had been alive at any time during the seven years last passed. The Agent for Chile hoped the Commission would dismiss the case. The Honorable President announced that the Commission would take action upon this case at the executive session on March 26th.

The Agent for Chile read to the Commission a letter from Governor Boutwell, former Agent for the United States, before the French and American Claims Commission and the American and Haytian Commission, in which it is said that the two Commissions referred to did not receive *ex parte* affidavits as evidence.

The assignment for the day being the argument in the cases of Clifford D. Blodgett *v.* The Republic of Chile, No. 14; Austin D. Moore *v.* The Republic of Chile, No. 35; Peter Bacigalupi *v.* The Republic of Chile, No. 42; and Andrew Moss *v.* The Republic of Chile, No. 25, the Agent for the United States opened the discussion.

In the Blodgett case, No. 14, the Agent for the United States submitted his brief as his opening argument. The Special Counsel for Chile replied at considerable length. The Agents for Chile and the United States made the closing arguments.

After a recess of two hours the Agent for the United States took up the Moore case, No. 35. He was followed by the Special Counsel for Chile and by the Agent for Chile. The Agent for the United States closed the argument.

The Agent for the United States said he would next take up the Bacigalupi case, No. 42, and the Moss case, No. 25. He reviewed the history of the time and the evidence in the cases at some length. The Special Counsel for Chile replied in an extended argument, and the Agent for Chile in closing the cases for his Government hoped the Commission would promptly disallow the four claims. The Agent for

the United States made the closing argument, after which the Commission adjourned until April 4, at 11 A. M.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

EIGHTEENTH SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,
WASHINGTON, D. C., *April* 4, 1901.

The Commission assembled at 11 o'clock A. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agents for the United States and Chile, the Special Counsel for the United States, and the Secretaries.

A copy of the minutes of the last meeting having been submitted to the Commissioners, and there being no objections thereto, they were approved.

In the case of William W. C. Dodge *v.* The Republic of Chile, No. 40, the Commission delivered its decision dismissing case.

In the case of Kate E. Leach *et al. v.* The Republic of Chile, No. 8, the following ruling was made:

"The Commission having examined the extract from the newspaper called 'El Mercurio,' published in Valparaiso in 1862, and having taken cognizance of the contents hereof, consider that, on account of the strictures therein contained upon the respondent Government, it is objectionable under Rule VIII of this Commission, and therefore we decline to allow the same to be filed."

The Agent for the United States then submitted the following resolution, which he said had been agreed upon by the Agents of both Governments:

"Whereas the Convention of May 24, 1897, under which this Commission was created, provides, in Article I thereof, That the Commission * * * shall be allowed for the

transaction of its business a period of four months, to be reckoned from the day of its first meeting for business,' and further, that, 'nevertheless, if the period of four months before stipulated shall prove insufficient for the settlement of the claims, the Commission are authorized to extend, at their discretion, such period to one or two months more;' and

"Whereas this Commission held its first meeting for business on the 18th day of December, A. D. 1900, and said period of four months will therefore expire on the 18th day of April, 1901, at which time several of the claims pending before this Commission cannot be in readiness for argument and submission, and will necessarily remain undisposed of, therefore, it is

"*Resolved:* That in the opinion of this Commission the said period of four months for the transaction of the business thereof is insufficient for the settlement of the claims pending before the Commission, and that it is necessary to extend the said period for two months more; and it is hereby

"*Ordered:* That the period for the transaction of business before this Commission be, and the same is hereby, extended for two months more, *i. e.*, from the 18th day of April to the 18th day of June, A. D. 1901."

Upon motion of the Honorable Commissioner for the United States, the resolution was adopted, and the Secretaries were instructed to notify the respective Governments of such extension.

The case of James M. Hallowes *v.* The Republic of Chile, No. 37, was taken up. The Agent for the United States opened the argument for the claimants.

A recess was taken until 2.30 o'clock.

Upon reassembling, the Agent for Chile spoke for the respondent Government, and the Agent for the United States closed the argument.

The Commission reserved its decision.

The Commission then adjourned to meet on April 10, at 2 o'clock P. M.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

APRIL 8, 1901.

His Excellency JOHN HAY,
Secretary of State, Washington.

SIR: The Commissioners appointed under the Convention between the United States of America and the Republic of Chile for the settlement of claims of the citizens of either country against the other, concluded May 24, 1897, have directed us, on their behalf, to inform Your Excellency that at a meeting of the Commission, held at Washington on the fourth day of April, 1901, the following resolution was adopted:

"Whereas the Convention of May 24, 1897, under which this Commission was created, provides in Article I thereof 'that the Commission * * * shall be allowed for the transaction of its business a period of four months, to be reckoned from the day of its first meeting for business,' and further, 'that nevertheless, if the period of four months before stipulated shall prove insufficient for the settlement of the claims, the Commission are authorized to extend, at their discretion, such period to one or two months more'; and

"Whereas this Commission held its first meeting for business on the 18th day of December, A. D. 1900, and said period of four months will therefore expire on the 18th day of April. 1901, at which time several of the claims pending before this Commission cannot be in readiness for argument and submission and will necessarily remain undisposed of; therefore it is

"*Resolved*, That in the opinion of this Commission the said period of four months for the transaction of the business thereof is insufficient for the settlement of the claims pending before the Commission, and that it is necessary to extend the said period for two months more; and it is hereby

"*Ordered:* That the period for the transaction of business before this Commission be, and the same is hereby, extended for two months more, *i. e.*, from the 18th day of April to the 18th day of June, A. D. 1901."

We beg, therefore, to accordingly advise you of this action of the Commission.

In witness whereof we have hereunto set our hand and caused the seal of the Commission to be affixed.

JOHN F. BAKER,
Secretary on the Part of the United States.

[SEAL.] ENRIQUE BALMACEDA,
Secretary on the Part of Chile.

NINETEENTH SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,

WASHINGTON, D. C., *April* 10, 1901.

The Commission met at 2 o'clock P. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agent for Chile, the Special Counsel for the United States, and the Secretaries.

The minutes of the last meeting were read and approved.

In the case of Austin D. Moore *v.* The Republic of Chile, No. 35, the Commission delivered its decision dismissing the case.

The Commission announced that it would reserve its decision in the following cases which had been submitted: Clifford D. Blodgett *v.* The Republic of Chile, No. 14; Andrew Moss *v.* The Republic of Chile, No. 25; James M Hallowes *v.* The Republic of Chile, No. 37; and Peter Bacigalupi *v.* The Republic of Chile, No. 42.

The Commission then adjourned to meet on May 3, 1901, at 10.30 o'clock A. M.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

TWENTIETH SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,
WASHINGTON, D. C., *May* 3, 1901.

The Commission met at 10.30 o'clock A. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agents and Special Counsels for the United States and Chile, and the Secretaries.

The minutes of the previous session were approved.

The Secretary for Chile read the following cablegram:

"SANTIAGO, CHILE, *April* 25.

"*Chilean Claims Commission, Washington, D. C.:*

"South American Steamship Company continues to be the only claimant in *Itata* case. Chilean tribunals' decisions have not nullified nor weakened right of said company to prosecute claim before Washington tribunal.

"(Signed) RAIMUNDO SILVA CRUZ,
"*Minister for Foreign Affairs.*"

In explanation of this cablegram the Agent for Chile stated that the Agent for the United States filed certain papers a few days ago in the case of the South American Steamship Company *v.* United States, No. 18, which would seem to show that a settlement had been effected in this case between the Government of Chile and the claimant company. Immediately upon seeing these papers he telegraphed his Government on this point, and in reply the Chilean Government sent to the Commission the cablegram just read, which he asked the Commission to have filed with the other papers in this case.

The Agent for the United States stated that he had no objection to the filing of this cablegram, but suggested that the original cablegram to which this was in reply should be

filed with it. To this the Agent for Chile assented, and the Commission thereupon ordered said cablegrams filed.

The case of Kate E. Leach *et al.* *v.* Republic of Chile, No. 8, was then taken up. The Agent for the United States read a motion requesting the Commission to cable the Chilean Government for certain evidence and thereupon submitted his case, prefacing his remarks with the statement that there was an agreement between the Agent for Chile and himself to submit this case without argument on the evidence and briefs filed.

The Agent for Chile stated that he would also rest his case on the evidence and briefs filed, but, with regard to the special motion presented by the Agent for the United States, he begged to offer a statement of his objections to the granting of the same, which he read. The Special Counsel for Chile made a brief argument in favor of dismissing the motion, to which the Agent for the United States replied.

The Commission reserved its decision both with regard to the motion and the case.

The case of Julia L. Williams and Frank A. Robinson, No. 33, was then taken up, the argument being opened by the Agent for the United States.

At 12 o'clock M. the Commission took a recess until 2 o'clock P. M.

Upon reassembling, the Agent for Chile presented the argument on behalf of the respondent Government, to which the Agent for the United States replied.

The Commission reserved its decision.

The Commission thereupon adjourned to meet at 10 o'clock A. M., May 4, 1901.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

TWENTY-FIRST SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,

WASHINGTON, D. C., *May* 4, 1901.

The Commission met at 10 o'clock A. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agents and Special Counsel for the United States and Chile, and the Secretaries.

The minutes of the previous session were read and approved.

The Commission handed down its decision dismissing the motion presented by the Agent for the United States on May 3, in the case of Kate E. Leach *et al.* *v.* The Republic of Chile, No. 8, as follows:

"In the case of Kate E. Leach *v.* The Republic of Chile, No. 8, the Commission having considered the application of the Honorable Agent for the United States, made on the 3d day of May, requesting that a cablegram be sent to the Minister of Foreign Relations for Chile, asking that a certified copy be forwarded to this Commission of a petition said to have been filed in 1860 and appearing in the volume of decrees in the general archives of the Chilean Government in the year 1860 at page 161, and also of a decree following said petition, in the same volume, making an award to Captain Janvrin of the ship *Townsend Jones*, a copy of which latter document is attached to the said motion; and it appearing to the Commission that the expense of cabling to Chile for these copies would be large, and that the Government of Chile should not be called upon to bear any portion of such expense, and considering that it takes from

40 to 45 days to get documents from the capital of Chile by mail, and the further fact that this Commission will expire by limitation on the 18th day of June, it is therefore

"*Ordered:* That the application be denied, but that the motion of the Honorable Agent for the United States in the matter of said application and the accompanying papers be filed in the case and be given such weight in the disposition thereof as they may be entitled to."

The Agent for Chile requested permission to file rebutting evidence in case No. 18, South American Steamship Co. *v.* United States, and that the argument already assigned for May 25 be postponed until the 8th of June, to the granting of which request the Agent for the United States stated that he had no objection. The Commission thereupon granted the request of the Agent for Chile.

The case of Michael O'Brien and James H. Kimball *v.* The Republic of Chile, No. 12, was then taken up and argued by the Special Counsel for the United States and Chile.

The Commission reserved its decision.

At 1.30 P. M. the Commission adjourned to meet May 11, 1901, at 10.30 o'clock A. M.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

TWENTY-SECOND SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,

WASHINGTON, D. C., *May* 11, 1901.

The Commission met at 10.30 o'clock A. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agents for the United States and Chile, the Special Counsel for the United States, and the Secretaries.

The minutes of the previous session were read and approved.

The Commission handed down its decisions dismissing the claims of Clifford D. Blodgett *v.* Republic of Chile, No. 14, and Peter Bacigalupi *v.* Republic of Chile, No. 42.

Case No. 1, Central and South American Telegraph Company *v.* Republic of Chile, was then taken up and argued by the Agents for the United States and Chile. The Commission reserved its decision.

The Commission adjourned to meet at 10.30 o'clock A. M., June 8, 1901.

J. B. PIODA,
President.

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

TWENTY-THIRD SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,
WASHINGTON, D. C., *June* 8, 1901.

The Commission met at 10.30 o'clock A. M.

Present: The Honorable J. B. Pioda, presiding; the Honorable Commissioners, the Agents for the United States and Chile, the Special Counsel for the United States and Chile, and the Secretaries.

The minutes of the previous session were read and approved.

The Agent for Chile announced to the Commission that Mr. Enrique Balmaceda, the Secretary for Chile, was compelled to be away for the remainder of the time during which the Commission would sit, and that Mr. Eliodoro Infante, the First Secretary of the Chilean Legation, by direction of the Minister for Chile, had consented to discharge the duties of Secretary on the part of Chile.

The Agent for Chile moved that the Commission avail itself of Mr. Infante's services.

The motion was agreed to.

Case No. 18, The South American Steamship Company *v.* The United States, was taken up, the opening argument therein being made by the Agent for Chile. The Special Counsel for the United States then spoke on behalf of the respondent Government.

At the conclusion of his argument, the President announced the following decisions:

Case No. 12, Michael O'Brien and James H. Kimball *v.* The Republic of Chile, claimant awarded the sum of $4,000.

Case No. 25, Andrew Moss *v.* The Republic of Chile, claimant awarded the sum of $6,000.

Case No. 37, James M. Hallowes *v.* The Republic of Chile, claimant awarded the sum of $9,000.

Case No. 33, Julia L. Williams, administratrix, *v.* The Republic of Chile, dismissed.

Case No. 33, Frank A. Robinson, trustee, *v.* The Republic of Chile, dismissed.

Case No. 8, Kate E. Leach *et al.* *v.* The Republic of Chile, dismissed by majority vote, the Commissioner for the United States dissenting.

A recess was thereupon taken.

Upon reassembling, the Agent for the United States argued the case for the respondent Government, the Special Counsel for Chile replied, and the Agent for Chile closed the argument.

The Commission reserved its decision.

The Commission then adjourned to meet June 17, 1901, at 2.30 P. M.

J. B. PIODA,
President.

JOHN F. BAKER,
ELIODORO INFANTE,
Secretaries.

TWENTY-FOURTH SESSION.

OFFICES OF THE

UNITED STATES AND CHILEAN CLAIMS COMMISSION,

WASHINGTON, D. C., *June* 17, 1901.

The Commission met at 2.30 o'clock P. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agents for the United States and Chile, the Special Counsel for the United States, and the Secretaries.

The minutes of the previous session were read and approved.

The President announced the following decisions:

Case No. 1, The Central & South American Telegraph Company *v.* The Republic of Chile, claimant awarded the sum of $4,062.29; the Commissioner for Chile dissenting.

Case No. 18, The South American Steamship Company *v.* The United States, dismissed; the Commissioner for Chile dissenting.

The President also announced the receipt of a petition, filed by the private attorneys therein, for the claimant, to reopen and reconsider Case. No. 42, Peter Bacigalupi *v.* The Republic of Chile. After examining said petition, the Commission decided that there were no facts stated therein which would warrant any change in the decision heretofore rendered, and that the petition must, therefore, be denied.

The President read the following communication from the Secretary of State of the United States:

"DEPARTMENT OF STATE,
WASHINGTON, *June* 17, 1901.

The United States and Chilean Claims Commission,
No. 1413 *G Street, Washington, D. C.*

GENTLEMEN: I am directed by the President to state that he will be pleased to receive the Commission to-morrow (Tuesday) at 12.30 P. M.

I have the honor to be, gentlemen,
Your obedient servant,
(Signed) JOHN HAY."

The Commission decided to call upon the President of the United States at the hour named.

The President laid before the Commission a draft for a final award concerning the matters referred to and determined by it, which was read at length, and is as follows:

FINAL AWARD.

We, the undersigned Commissioners, appointed under and in pursuance of Article I of the Convention between the United States of America and the Republic of Chile, signed at Santiago, August 7, 1892, as revived by the Convention between the same high contracting parties, signed at Washington, May 24, 1897, do now make this our final award of and concerning the matters referred to us by said convention.

We award that the Government of the Republic of Chile shall pay to the Government of the United States of America, within six months from the date hereof, the sum of twenty-eight thousand and sixty-two dollars and twenty-nine cents ($28,062.29) gold, without interest, in accordance with the provisions of Article IX of the revived Convention aforesaid, for and in full satisfaction of the several claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of the Republic

of Chile, arising out of acts committed against their persons or property by the civil or military authorities of Chile, which have been determined by us, said sum being the aggregate of the principal sums and interest allowed to certain claimants by the several separate awards to that effect, made in writing and signed by us or such of us as assented to said separate awards.

We further award that the Government of the United States of America shall pay to the Government of the Republic of Chile, within six months from the date hereof, the sum of three thousand dollars ($3,000) gold, without interest, in accordance with the provisions of Article IX of the revived Convention aforesaid, for and in full satisfaction of the claim allowed to the legal representatives of Ricardo L. Trumbull, a citizen of Chile, by the award to that effect, made in writing and signed by each of us.

All of the awards above referred to are among the records of this Commission, to which reference may be had for more particular information relative thereto.

We also refer to a list and statement of the claims referred to us by the aforesaid Convention, which list is hereto attached, and gives the number of each claim, the name of the claimant, the character of the demand, the time when it arose, the disposition of the claim, and, where an allowance has been made, the sum allowed in each case.

Signed at Washington, D. C., this 18th day of June, A. D. 1901.

J. B. PIODA,
President and Commissioner Appointed by the President of the Swiss Confederation.

WM. G. GAGE,
Commissioner on the part of the United States.

C. MORLA VICUÑA,
Commissioner on the part of Chile.

Although the Commissioner on the part of the United States signs this final award, he solemnly declares that he does it, reasserting the principles and conclusions set forth in the dissenting opinions that were filed by him in the respective cases, as shown by the records of the Commission, and that he signs this award under a formal reservation as to those cases in which he has so dissented.

WM. G. GAGE,
Commissioner on the part of the United States.

Although the Commissioner on the part of Chile signs this final award, he solemnly declares that he does it, reasserting the principles and conclusions set forth in the dissenting opinions that were filed by him in the respective cases, as shown by the records of the Commission, and that he signs this award under a formal reservation as to those cases in which he has so dissented.

C. MORLA VICUÑA,
Commissioner on the part of Chile.

SCHEDULE OF CASES CONSIDERED AND DETERMINED BY THE COMMISSION.

Claim 1, Central & South American Telegraph Company against Chile, as to Item No. 6 of its original memorial for reimbursement of a tax claimed to have been illegally imposed by the respondent Government in 1891; award against Chile for $4,062.29, gold, Commissioner Morla Vicuña dissenting.

Claim No. 3, Henry Chauncey against Chile, for money due from Bolivia, secured upon property alleged to have been interfered with by Chile between 1876 and 1880; dismissed for want of jurisdiction, Commissioner Gage dissenting.

Claim No. 8, Kate E. Leach *et al.* against Chile, for value of the brig *Thomas and Jones* and cargo, seized in the harbor

of Valparaiso in 1859; dismissed, Commissioner Gage dissenting.

Claim No. 12, Michael O'Brien and James H. Kimball against Chile, for salvage on vessel *Rippling Wave*, saved by them at Punta Arenas in 1869; award against Chile for $4,000.

Claim No. 14, Clifford D. Blodgett against Chile, for merchandise in hotel at Valparaiso destroyed by soldiers August 28, 1891; dismissed.

Claim No. 18, The South American Steamship Company against The United States, for damage to and detention of the steamer *Itata* between April 6 and November 10, 1891; dismissed, Commissioner Vicuña dissenting.

Claim No. 25, Andrew Moss against Chile, for four houses burned at Miraflores, January, 1881; award against Chile for $6,000.

Claim No. 26, Henry Chauncey *et al.* against Chile, for loss on cargo of ship *Sportsman*, seized at Santa Maria, in 1857; dismissed for want of jurisdiction.

Claim No. 27, Ricardo L. Trumbull against The United States, for services as counsel before the courts of Chile in extradition suit in 1889; award against the United States for $3,000.

Claim No. 30, Henry S. Prevost and Charles A. Prevost against Chile, for war contribution during the Chile-Peruvian war, September 30, 1880; dismissed.

Claim No. 31, Grant Walker, *et al.*, against Chile, for detention of ship *Sportsman* on occasion referred to in Claim No. 26; dismissed, Commissioner Gage dissenting.

Claim No. 32, George W. L. Mayers against Chile, for value of nitrate certificates, 1879–1883; dismissed.

Claim No. 33, Julia L. Williams, administratrix, and Frank A. Robinson, trustee, against Chile, for seizure and detention of steamer *Polynesian* at Coronel in 1856; dismissed.

Claim No. 35, Austin D. Moore against Chile, for dam-

age to house at Ancon, Peru, from bombardment by Chilean navy, November, 1880; dismissed.

Claim No. 37, James M. Hallowes against Chile, for damage from detention of boiler, etc., by order of Balmaceda Government, 1891; award against Chile for $9,000.

Claim No. 40, William W. C. Dodge against Chile, for personal injury and loss of property at Miraflores, April 21, 1881; dismissed.

Claim No. 41, Mauricio Levek against Chile, for false imprisonment and damage to property at Curico, March, 1857; award against Chile for $5,000.

Claim No. 42, Peter Bacigalupi against Chile, for destruction of stock of jewelry in store at Chorrillos, Peru, January, 1881; dismissed, Commissioner Gage dissenting.

The above draft was approved, adopted, and signed by the three Honorable Commissioners.

The Agent for the United States moved the adoption of the following order:

"*Ordered:* That the Secretaries be, and they hereby are, instructed to proceed, at the earliest moment, to properly arrange and index all the records and books of the Commission, enter therein all proceedings, decisions, resolutions, or orders thereof not recorded upon final adjournment, cause to be bound fifty copies of the printed minutes and decisions of the Commission, and not to exceed fifty copies each of such reports as may be made by the Agents for the respective Governments, which volumes will be distributed as follows: Five copies to the President of the Commission, one to each of the members and officers of the Commission, ten to the Government of Chile, and the balance to the Government of the United States."

The motion was agreed to.

The following orders were also considered and agreed to:

Ordered: That after carrying out the foregoing instructions, the Secretaries shall deliver to the State Department of the United States all the papers, documents, and evidence

on file before the Commission, and one copy of the original and attested records of the Commission, delivering at the same time one copy of said original and attested records to the Government of Chile, taking receipts therefor.

Ordered, further: That the Secretaries be instructed and empowered to retain the necessary assistants to wind up, in the shortest possible time, the business and work of the Commission, in accordance with the foregoing orders.

Ordered, further: That the Secretaries, after completing the work indicated above, proceed to sell at public sale all the property belonging to the Commission, and pay over the proceeds thereof to the State Department of the United States for proper disposition.

The Commission then adjourned until June 18, 1901, at 11 o'clock A. M.

J. B. PIODA,
President.

JOHN F. BAKER,
ELIODORO INFANTE,
Secretaries.

TWENTY-FIFTH SESSION.

OFFICES OF THE
UNITED STATES AND CHILEAN CLAIMS COMMISSION,
WASHINGTON, D. C., *June* 18, 1901.

The Commission met at 11 o'clock A. M.

Present: The Honorable J. B. Pioda, presiding, the Honorable Commissioners, the Agents for the United States and Chile, the Special Counsel for the United States, and the Secretaries.

The minutes of the previous session were approved.

The President then delivered the following address:

GENTLEMEN: We have completed the work which, by limitation, had been left undone by the first Commission appointed according to the Convention of Santiago, and which, according to the supplementary Convention of 1897, has been intrusted to this Commission, in fulfillment of the hope expressed by my honorable predecessor in this chair at the end of the term of the prior Commission.

Therefore I have the honor to declare closed the sessions of our Commission in conformity with the first paragraph of Article I of the Convention of 1897.

Before leaving this seat I wish to offer, in the name of the members of the Commission, the expression of our grateful feelings to the Honorable Agents and Counsel of the high contracting parties, as well as to the gentlemen who successively acted as secretaries of this Commission, for the brilliant, zealous and courteous manner in which they have fulfilled their mission and their duties.

In parting from each other I congratulate you, gentlemen, for having collaborated in this work of peace which, no doubt, will contribute in binding more closely together two

generous nations, the friendship of both of whom my own country is happy to enjoy.

Gentlemen, I am proud myself to have had the honor to be seated among you. Accept, with the assurance of my high consideration, my hearty good wishes and farewell.

The Commissioner for the United States moved that the minutes of the Twenty-fifth Session stand approved.

The motion was agreed to.

And thereupon, at 11 o'clock and 45 minutes A. M., the Commission adjourned *sine die*.

J. B. PIODA,
President.

JOHN F. BAKER,
ELIODORO INFANTE,
Secretaries.

INDEX TO MINUTES.

Page.

AGENT:
- for United States argues as to status of present Commission, . 18
- for United States takes exception to decision regarding cases before Commission, ... 21
- for Chile moves adoption of order for printing additional copies of rules, ... 27
- for United States explains status of pending cases, . . . 28
- for United States gives notice will make certain motions, . . 28
- for United States presents Special Counsel for United States, . 31
- for United States discusses question of pending claims, . . 32
- for Chile moves change in Secretary for Chile, ... 81

AGENTS:
- ordered to select certain papers for printing, ... 15

ARGUMENTS:
- all to be in English language, ... 25
- rule adopted regarding oral, ... 32

AWARD:
- duplicate copies of records to be kept in English and Spanish, . 27
- one duplicate record of to be delivered to each Government at close of Commission, ... 27
- of Commission in Trumbull *v.* United States, ... 65
- of Commission in Levek *v.* Chile, ... 65
- of Commission in O'Brien & Kimball *v.* Chile, ... 81
- of Commission in Moss *v.* Chile, ... 81
- of Commission in Hallowes *v.* Chile, ... 82
- of Commission in Central and South American Telegraph Co. *v.* Chile, ... 83
- final, ... 84, 88

BACIGALUPI, PETER, *v.* REPUBLIC OF CHILE, No. 42:
- Agent for United States desires to introduce documentary evidence and take deposition of claimant, ... 41
- Agent for Chile objects, ... 42
- Commission grants permission to file documentary evidence, . 42
- Commission reserves decision as to taking of deposition of claimant, ... 42
- decision rendered as to taking deposition of claimant, . . 43
- Commissioner and Agent for Chile state they will not object to taking claimant's deposition, ... 46
- Agent for Chile records statement that claimant alone is responsible for failure to place on record his deposition, which Commissioner for Chile endorsed, ... 49, 50

Page.

BACIGALUPI, PETER, v. REPUBLIC OF CHILE, No 42—*Continued.*

Special Counsel for United States states reasons why claimant's deposition is not taken, and objects to statement of Agent for Chile being recorded, ... 50

Agent for Chile gives reason for desiring his statement recorded, 50

Commission orders statement be recorded, ... 50

Agent for Chile states date on which he will be ready to argue, . 60

case to be considered with others involving like questions, . . 61

case argued, ... 66

decision reserved, ... 73

case dismissed, ... 79

petition of private attorneys to reopen case denied, ... 83

BAKER, JOHN F.:

Secretary for United States, recognized as 15

BALMACEDA, ENRIQUE:

Secretary for Chile, recognized as, ... 15

resignation announced by Agent for Chile, ... 81

BLODGETT, CLIFFORD D., v. REPUBLIC OF CHILE, No. 14:

Agent for Chile states date on which he will be ready to argue, 60

case to be considered with others involving like questions, . 61

case argued, ... 66

decision reserved, ... 73

case dismissed, ... 79

BRIEFS:

all to be in English language, ... 25

of counsel to be printed at expense of Commission, . . . 26

BUSINESS

December 18, 1900, adopted as first day for, ... 16

CASES CONSIDERED AND DETERMINED

recapitulation of, ... 86

CENTRAL AND SOUTH AMERICAN TELEGRAPH COMPANY v. REPUBLIC OF CHILE, No. 1

discussion as to whether claim is pending before present Commission, . . 32 33

decision reserved, ... 33

Agent for United States will file on written statement as to desire of claimant to press Item 6 . . . 38

Commission decides it has full jurisdiction, . . . 45

case argued 79

decision reserved . . . 79

award made, ... 83

CHAUNCEY, HENRY v. REPUBLIC OF CHILE, No. 3

Agent for Chile introduces resolution regarding argument on point of jurisdiction . . . 33

Page.

CHAUNCEY, HENRY, *v.* REPUBLIC OF CHILE, No. 3—*Continued.*

Agent for United States objects to adoption of resolution, . 33
Agent for United States obtains leave file supplemental memorial, 33
Agent for Chile allowed file evidence, ... 33
Agent for United States presents written argument as to jurisdiction, ... 38
Commission reserves decision on question of jurisdiction, . . 39
Agent for Chile announces he will present demurrer if his motion be not granted, ... 41
decision rendered that question of jurisdiction be considered alone before case is taken up on its merits, ... 45
Agent for Chile submits points which he will discuss as to question of jurisdiction, ... 46
Agent for Chile suggests date for argument of question of jurisdiction, ... 52
Agents for both Governments announce date on which they will be ready to argue question of jurisdiction, ... 52
motion to dismiss for want of jurisdiction argued, ... 53
case dismissed, Commissioner for United States dissenting, . 57

CHAUNCEY, HENRY, ET AL. *v.* REPUBLIC OF CHILE, No. 26:

no objection made to filing documentary evidence, ... 34
Agent for Chile calls attention of Commission to fact that he had objected to any but documentary evidence being filed by Agent for United States, ... 46
Special Counsel for United States moves evidence in Case No. 26 be considered in No. 31 and *vice versa*, ... 49
motion agreed to, ... 49
Agent for Chile announces date on which he will close case, . 52
Agent for United States submits motion to strike certain evidence, introduced by Agent for Chile, from record, . . 57
Agent for Chile objects, ... 57
case argued, ... 59
decision reserved, ... 60
case dismissed, ... 61

CLAIMS—LIST OF:

No. 1. Central and South American Telegraph Company *v.* Chile, ... 32, 33, 38, 45, 79, 83
No. 3. Henry Chauncey *v.* Chile, 33, 38, 39, 41, 45, 46, 52, 53, 57.
No. 8. Kate E. Leach *et al.* *v.* Chile, . 52, 55, 58, 65, 69, 76, 77, 82
No. 12. Michael O'Brien and James H. Kimball *v.* Chile, 33, 37, 78, 81
No. 14. Clifford D. Blodgett *v.* Chile, . . 60, 61, 66, 73, 79
No. 18. South American Steamship Company *v.* United States, 31, 32, 75, 76, 78, 81, 82, 83
No. 25. Andrew Moss *v.* Chile, . 34, 38, 39, 40, 46, 60, 61, 66, 73, 81
No. 26. Henry Chauncey *et al.* *v.* Chile, . 34, 46, 49, 52, 57, 59, 61

Page.

CLAIMS—List of—*Continued.*

No. 27. Ricardo L. Trumbull *v.* United States, 42, 43, 45, 50, 52, 65
No. 30. Henry S. and Charles A. Prevost *v.* Chile, . 52, 60, 63, 65
No. 31. Grant Walker *et al.* *v.* Chile, . 34, 46, 49, 52, 57, 59, 63
No. 32. George W. L. Mayers *v.* Chile, . . 34, 38, 46, 51, 52
No. 33. Julia L. Williams and Frank A. Robinson *v.* Chile, 41, 44, 45, 52, 76, 82
No. 35. Austin D. Moore *v.* Chile, . . . 52, 59, 60, 61, 66, 73
No. 37. James M. Hallowes *v.* Chile, . . 52, 70, 73, 82
No. 40. William W. C. Dodge *v.* Chile, . 52, 53, 59, 61, 65, 66, 69
No. 41. Mauricio Levek *v.* Chile, . 41, 45, 52, 54, 60, 62, 65
No. 42. Peter Bacigalupi *v.* Chile, 41, 43, 46, 49, 50, 60, 66, 73, 79, 83

COMMISSION:

takes recess from June 15 to November 15, 1900, ... 16
decides to adopt its own rules, ... 20
may authorize additional testimony to be taken at any time, . 24
" require witnesses to appear personally, ... 24
for sufficient cause will suspend or modify its rules, ... 27
first day of meeting for business, ... 28
attends New Year reception given by President of the United States and breakfast tendered by the Secretary of State of the United States, ... 49
announces will consider certain cases together, ... 61
extension of period for transaction of business, ... 70

CONVENTION

of Washington, May 24, 1897, ... 3
of Santiago, August 7, 1892, ... 5

CRUZ, Hon. ANIBAL,

Agent and Counsel for Chile, recognized as, ... 15

DECISION:

of Commission dismissing case of Mayers *v.* Chile, No. 32, . . 52
of Commission dismissing case of Chauncey *v.* Chile, No. 3, . 57
of Commission dismissing case of Chauncey *et al.* *v.* Chile, No. 26, 61
of Commission dismissing case of Walker *et al.* *v.* Chile, No. 31, 63
of Commission in case of Trumbull *v.* United States, No. 27, . 65
of Commission dismissing case of Prevost *v.* Chile, No. 30, . 65
of Commission in case of Levek *v.* Chile, No. 41, ... 65
of Commission dismissing case of Dodge *v.* Chile, No. 40, . . 69
of Commission dismissing case of Moore *v.* Chile, No. 35, . . 73
of Commission dismissing case of Blodgett *v.* Chile, No. 14, . 79
of Commission dismissing case of Bacigalupi *v.* Chile, No. 42, . 79
of Commission in O'Brien and Kimball *v.* Chile, No. 12, . . 81
of Commission in Moss *v.* Chile, No. 25, . . . 81
of Commission in Hallowes *v.* Chile, No. 37, ... 82
of Commission dismissing Williams and Robinson *v.* Chile, No. 33, 82

Page.

DECISION—*Continued.*
of Commission dismissing Leach *et al.* *v.* Chile, No. 8, . . 82
of Commission in Central and South American Telegraph Company *v.* Chile, No. 1, ... 83
of Commission dismissing South American Steamship Company *v.* United States, No. 18, ... 83

DECISIONS:
duplicate copies of record of to be kept in English and Spanish, 27
one duplicate to be delivered to each Government at close of Commission, ... 27

DEPOSITIONS:
Rule concerning, ... 23, 24
leading questions not to be put by party calling witness, . . 24
officer taking not to pass upon objections of counsel . . . 24
shall record questions and answers as if unobjected to, . . 24
objections to notice for to be made in writing and filed in one week after notice, ... 25
to be taken in language witness ordinarily uses, ... 25
if in language other than English, translation to be made, . . 25

DOCKET:
all claims to be entered in, ... 22
certain entries from prior docket to be copied into, . . 22
duplicate copies to be kept in English and Spanish, . . . 27
one duplicate to be delivered to each Government at close of Commission, ... 27

DODGE, WM. W. C., *v.* REPUBLIC OF CHILE, No. 40:
Agent for Chile announces date on which, under the rules, case will be closed. 52
Agent for United States announces inability to locate claimant, and additional time is granted on motion of Agent for Chile, 53
Agent for Chile moves case be stricken from docket, . . 59
Agent for United States objects, ... 59
decision reserved, ... 59
Commission announces date case will be heard, . . . 61
Commission wishes information concerning claimant, . . 65
Agent for United States makes statement, ... 66
Agent for Chile moves to dismiss case, ... 66
decision reserved, ... 66
case dismissed, ... 69

EVIDENCE:
competency, relevancy, and effect of, to be determined by Commission, ... 25
copies of papers offered as such to be certified, ... 25
what may be received as, ... 25
all documentary to be submitted in original language, . . 26

Page

EVIDENCE—*Continued.*
resolution by Commissioner for United States as to date of filing, 27
ex parte affidavits not received as by certain Commissions, . 66
Agent for United States asks for ruling regarding use of official documents as evidence, not formally filed with Commission, . 63
EXPENSES:
Secretaries authorized to audit and order payment of, . . . 21
FINAL AWARD, 84-88.
GAGE, HON. WILLIAM G.:
Commissioner on the part of the United States, ... 14
signs solemn declaration, ... 14
HALLOWES, JAMES M., *v.* REPUBLIC OF CHILE, No. 37:
Agent for Chile announces date on which, under the rules, case will be closed, ... 52
case argued, ... 70
decision reserved, ... 73
award made, ... 82
INFANTE, ELIODORO:
Secretary for Chile, recognized as (*ad interim*) 15
extended thanks of Commission for acting as Secretary of Chile, 18
regularly pointed Secretary for Chile, ... 81
"ITATA" (The): (See South American Steamship Co.)
LEACH, KATE E., ET AL. *v.* REPUBLIC OF CHILE, No. 8:
Agent for Chile announces date on which he will close case, . 52
Agent for United States granted permission introduce testimony in rebuttal, ... 55
Agent for Chile expresses desire that case be closed by Agent for United States as soon as possible, ... 58
Agent for Chile objects to filing of certain papers, ... 65
Agents for both Governments submit views in writing on question of filing certain papers, ... 65
decision reserved, ... 65
Commission declines to receive certain papers as evidence, . 69
Agent for United States reads motion requesting Commission to cable Chilean Government for certain evidence, ... 76
Agent for United States announces agreement between himself and Agent for Chile to submit case on briefs, ... 76
Agent for Chile reads objection to motion presented by Agent for United States, ... 76
decision reserved as to motion and case, ... 76
motion dismissed, ... 77
case dismissed, ... 82
LEVEK, MAURICIO, *v.* REPUBLIC OF CHILE, No. 41
Agent for United States wishes file amended memorial, . . . 41
Agent for Chile objects, ... 41

Page.

LEVEK, MAURICIO, *v.* REPUBLIC OF CHILE, No. 41—*Continued.*
decision reserved, ... 41
motion to amend memorial denied, ... 45
Agent for Chile announces date on which he will close case, . 52
Agent for Chile announces date on which he will be ready to argue, ... 52
Agent for United States permitted to take deposition of claimant in rebuttal, ... 54
Agent for Chile again states date on which he will be ready to argue, ... 60
case argued, ... 62
decision reserved, ... 62
case decided; award made, ... 65

MAYERS, GEORGE W. L., *v.* REPUBLIC OF CHILE, No. 32:
Agent for United States demands production of certain documents, known as nitrate certificates, ... 34
Agent for Chile explains why nitrate certificates cannot be produced, ... 34
Commission inquires of Agent for United States if there is claimant in this case, ... 34
Commission requests Agent for United States to ascertain whether claimant desires to prosecute further, ... 34
Agent for United States informs Commission he has sent to private attorney for information regarding prosecution, . . 38
Special Counsel for United States ordered by Commission to make definite statement at next meeting as to whether claim will be prosecuted, ... 46
letter from private attorney read, ... 51
consideration objected to by Agent for Chile, ... 51
Agent for Chile moves case be stricken from docket, ... 51
Special Counsel suggests that if case be dismissed the words "without prejudice" be added, ... 51
Agent for Chile objects to adding words "without prejudice," . 51
decision on motions reserved, ... 51
Agent for Chile again moves case be stricken from docket, . 51
Special Counsel for United States submits motion that if case is dismissed it be "without prejudice," 51
case dismissed, ... 52

MEMORIALS:
as to time may be amended, ... 22
validity of to be determined by Commission, ... 25

MINUTES:
rules for keeping, &c., ... 26
duplicate copies to be kept in English and Spanish, ... 27
one duplicate to be delivered to each government at close of Commission, ... 27

Page.

MOORE, AUSTIN D., v. REPUBLIC OF CHILE, No. 35:
Agent for Chile announces date on which, under the rules, case will be closed, ... 52
Agent for United States denied extension of time to procure certain evidence, ... 59
Agent for Chile states date on which he will be ready to argue, 60
case to be considered with others involving like questions, . 61
case argued, ... 66
case dismissed, ... 73

MOSS, ANDREW, v. REPUBLIC OF CHILE, No 25:
Agent for United States notifies Commission he desires to take more evidence and depositions, ... 34
Agent for United States allowed to take testimony under certain conditions, ... 36
no objection to filing documentary evidence, ... 38
Agent for United States gives reasons why deposition of Charles Hunt should be taken, ... 39
Agent for Chile objects to taking deposition, ... 39
Commissioner for Chile opposes taking deposition, citing Rule 2 in support thereof, ... 39
Commissioner for United States considered deposition as coming in spirit of Rule 7, ... 40
deposition allowed to be taken on certain points, ... 40
Agent for Chile accords permission to private attorney for claimant to examine Mr. Hunt upon all points desired, ... 46
Agent for Chile states date on which he will be ready to argue, 60
case to be considered with others involving like questions, . 61
case argued, ... 66
decision reserved, ... 73
award made, ... 81

NOTICE BOOK:
Secretaries to keep, ... 26

O'BRIEN AND KIMBALL v. REPUBLIC OF CHILE, No. 12:
Agent for United States desires to introduce more testimony, . 33
Agent for Chile objects, ... 33
Commission makes order respecting additional testimony, . . 33
Agent for United States moves more testimony be taken from Mr. O'Brien, ... 37
Agent for Chile objects, ... 37
Commission decides no new deposition shall be allowed, . . 37
Commission confirms prior agreement to accept Kimball testimony, ... 37
case argued 78
decision reserved, ... 78
award made, ... 81

Page.

OFFICES:
Secretaries authorized to procure, furnish, etc., ... 15
location of, ... 16
PERRY, HON. JOHN HOYT:
Agent and Counsel for United States, recognized as, . . 15
PIODA, HON. J. B.:
named by President of Swiss Confederation as Commissioner, . 13
signs solemn declaration, ... 14
elected President of Commission, ... 14
PLEADINGS:
of Counsel to be printed at expense of Commission, . . . 26
PRESIDENT:
delivers opening address, ... 17
moves Agents be instructed to prepare and present rules, . . 20
to subscribe to correctness of minutes, ... 26
delivers farewell address, ... 91
PREVOST, HENRY S., AND CHARLES A., *v.* REPUBLIC OF CHILE, No. 30.
Agent for Chile announces date on which he will close case, . 52
Agent for Chile announces date on which he will be ready to argue, ... 60
case argued, ... 63
case dismissed, ... 65
PRINTING:
copies of all printed papers to be reserved for State Department, 16
of final reports, etc., ... 88
PROCEDURE:
to be that observed in courts of justice of respective countries, . 26
PROOFS:
time allowed Respondent Government to complete, ... 22
time allowed claimant to complete, ... 22
REPORT (FINAL):
minutes and decisions, manner of distributing, ... 88
ROBINSON, FRANK A.:
(See Williams and Robinson.)
RULES:
Agents instructed to prepare draft of, ... 15
Agent for United States presents draft of, and argues for adoption of new rules, ... 18
Agent for Chile offers resolution concerning, ... 18
Commission decides to adopt its own, ... 20
Agents instructed to prepare further draft of, ... 20
Agent for United States presents new draft, ... 21
of Commission, ... 22-27
copies of old and new ordered printed, ... 27
adoption of for oral arguments, ... 32

Page

SECRETARIES:
permitted to withdraw papers from State Department, . . . 15
ordered to employ stenographer and typewriter, ... 18
authorized to audit contingent accounts, etc., ... 21
to keep record of proceedings, ... 26
to counter-subscribe to correctness of minutes, ... 26
to keep notice book, ... 26
to provide printed forms for awards and decisions . . . 26
to be custodians of papers, documents, &c., of Commission, . 27
instructed as to papers filed and their withdrawal from files, . 27
ordered to notify respective Governments of readiness of Commission to transact business, ... 28
notify Secretary of State of United States of readiness of Commission to proceed to transaction of business, ... 28
instructed as to closing up business of Commission, . . . 80

SECRETARY:
for Chile, *ad interim*, recognized, ... 15
for Chile, recognized, ... 18
for United States announces employment of stenographer and typewriter, ... 21
for Chile resigns and another appointed, ... 81

SECRETARY OF STATE:
of the United States certifies to signatures of Commissioners, . 14
of the United States notified of readiness of Commission to transact business, ... 28
of United States notified of extension of Commission's time, . 71
of United States transmits invitation for Commission call on President of United States, 84

SESSION
First, . . . 13
Second, . . . 17
Third, . . . 21
Fourth, . . . 31
Fifth, . . . 37
Sixth, . . . 39
Seventh, . . . 41
Eighth, . . . 43
Ninth, . . . 45
Tenth . . . 49
Eleventh, . . . 53
Twelfth, . . . 55
Thirteenth, . . . 57
Fourteenth, . . . 59
Fifteenth, . . . 61
Sixteenth, . . . 63

Page.

SESSION—*Continued.*
Seventeenth, ... 65
Eighteenth, ... 69
Nineteenth, ... 73
Twentieth, ... 75
Twenty-first, ... 77
Twenty-second, ... 79
Twenty-third, ... 81
Twenty-fourth, ... 83
Twenty-fifth, ... 91

SOLEMN DECLARATION:
signed by Commissioners, ... 14

SOUTH AMERICAN STEAMSHIP COMPANY *v.* UNITED STATES, No. 18:
Agent for Chile asks leave to file amended memorial in, . . . 31
copy of cablegram as to claimant filed in, ... 75
Agent for Chile allowed to file rebutting evidence in, . . . 78
argument in, opened, ... 81
argument in, closed, ... 82
decision reserved, ... 82
case dismissed, ... 83

STENOGRAPHER AND TYPEWRITER:
employment of authorized, ... 18
appointment of, ... 21

STROBEL, PROFESSOR EDWARD H.:
Special Counsel for Chile, recognized, ... 18

TESTIMONY:
time allowed Respondent Government to complete, ... 23
in rebuttal, Commission will allow, ... 23
may be taken by deposition with or without interrogatories, . 23
notice to opposing party to be given, ... 23
adverse party may cross-examine, ... 23
Commission may authorize additional testimony to be taken at any time, ... 24
certain kinds to be stricken from record, ... 25
Commissioner for Chile suggests rules for be not violated, . . 38

TRUMBULL, RICARDO L., *v.* UNITED STATES, No. 27:
Agent for United States makes statement as to his position on question of jurisdiction, ... 42
Agent for Chile gives his opinion of the position assumed by Agent for United States, ... 42
Agent for United States ordered to report as to whether he will raise question of jurisdiction, ... 43
Special Counsel for United States requested by President to report at next meeting of Commission as to whether question of jurisdiction will be raised, ... 45

Page

TRUMBULL, RICARDO L., v. UNITED STATES, No. 27—*Continued.*

President lays before Commission statement from Agent for United States regarding question of jurisdiction, ... 50

Agent for Chile permitted to file documentary evidence, after closing, if he desires, ... 52

case decided; award made, ... 65

VICUÑA, Hon. C. MORLA:

Commissioner on the part of Chile, ... 14

signs solemn declaration, ... 14

WALKER, GRANT, ET AL. v. REPUBLIC OF CHILE, No. 31:

no objection to filing documentary evidence, ... 34

Agent for Chile calls attention of Commission to fact that he had objected to any but documentary evidence being filed by Agent for United States, ... 46

motion to consider evidence in cases No. 26 and No. 31 together agreed to, ... 49

Agent for Chile announces date on which he will close case, . 52

date set for argument, ... 57

Agent for United States submits motion to strike certain evidence introduced by Agent for Chile, from record, . . . 57

Agent for Chile objects, ... 57

case argued, ... 59

decision reserved, ... 60

case dismissed, ... 63

WALTON, Hon. CLIFFORD STEVENS:

Special Counsel for United States, presented by Agent for United States, ... 31

WILLIAMS AND ROBINSON v. REPUBLIC OF CHILE, No. 33:

Agent for United States wishes file amended memorial in case of Julia L. Williams, ... 41

Agent for Chile objects 41

decision reserved, ... 41

Agent for Chile states his objections to filing amended memorial in case of Julia L. Williams, ... 44

decision reserved, 44

decided, that claimant be allowed to amend memorial in case of Julia L. Williams, ... 46

Agent for Chile announces date on which, under the rules, case will be closed, ... 52

case argued, ... 76

decision reserved, ... 76

cases dismissed 82

DECISIONS OF THE COMMISSION.

United States and Chilean Claims Commission.

DECISION No. 1.

CENTRAL AND SOUTH AMERICAN TELEGRAPH COMPANY *v.* THE REPUBLIC OF CHILE.	*No.* 1.

Decision of the Majority of the Commission on the Question as to whether or not Item No. 6 *of Memorial in this Case is Before the Commission.*

Under the Convention entered into on May 24, 1897, between the United States of America and the Republic of Chile, to revive the Convention of August 7, 1892, it was agreed as follows:

"Know ye, that whereas a Convention between the United States of America and the Republic of Chile *to revive* the Convention of August 7, 1892, between the two countries, to adjust amicably the claims of citizens of either country against the government of the other, was concluded at Washington on the 24th day of May, 1897, the original of which Convention, being in the English and Spanish languages, is as amended by the Senate of the United States word for word as follows:"

"The Convention between the United States of America and the Republic of Chile, signed August 7, 1892, having expired, and the Commission thereunder established to adjust amicably the claims made by the citizens of either country against the government of the other having failed, through limitation, to conclude its task, *leaving certain claims duly presented to the said Commission unadjudicated*, the Government of the United States of America and the Government of the Republic of Chile, desiring to remove every cause of difference in the friendly relations that happily exist between the two nations, have agreed *to revive* the said Convention of August 7, 1892, and for that purpose have named as their plenipotentiaries to wit: * * * who have agreed upon the articles following:

ARTICLE I.

"It is expressly stipulated that this article shall in nowise extend or change the period designated by the first paragraph of Article 8 of the said Convention for the presentation of the claims; so that the new Commission shall be limited to considering the claims *duly presented to the former Commission in conformity with the terms of the Convention and with the rules that governed its labors.* * * *"

Article 8 of the Convention of August 7, 1892, is as follows:

ARTICLE VIII.

"Every claim shall be presented to the Commissioners within a period of two months, reckoned from the day of their first meeting for business after notice to the respective governments, as prescribed in Article V of this Convention. Nevertheless, where reasons for delay shall be established to the satisfaction of the Commissioners, or of any two of them, the period for presenting the claims may be extended by them to any time not exceeding two months longer. * * *

"It shall be competent in each case for the said Commissioners to decide whether any claim has or has not been duly made, preferred, and laid before them, *either wholly or to*

any and what extent, according to the true intent and meaning of this Convention."

The Convention entered into on August 7, 1892, expired by time limitation on the 9th day of April, 1894.

On said date the Commission unanimously made the following order:

"Whereas there are still pending claims of the citizens of either country against the other country in which the evidence has not been completed under the rules of the Commission, and other cases are pending in which the United States has completed the testimony and closed the cases, but in which Chile has not yet completed her testimony, and other cases in which both countries have closed but not submitted, and other cases which have been closed and submitted, which said cases time will not permit this Commission to hear and consider; and

"Whereas it is evident that every endeavor of the parties has been made to submit these cases to the Commission, but the shortness of the time limit of the treaty and the length of time required to take testimony in Chile and Peru have prevented any result of the proceedings of the Commission therein without fault on the part of the claimants:

"Therefore, it is ordered that all cases presented to but not finally determined by the Commission be remitted to the respective Governments of the United States and Chile for such disposition as they may hereafter agree upon."

It seems clear from the above—

(1) That a number of cases which had been duly presented to the former Commission remained unadjudicated on April 9, 1894, not only on account of lack of time for hearing, but also on account of lack of time for claimants to file testimony.

(2) That such cases not finally determined by the Commission were remitted to the respective Governments of the United States and of Chile for such disposition as they might hereafter agree upon.

(3) That by the Convention of May 24, 1897, the said Governments agreed to *revive* the said Convention of August

7, 1892, for the limited purpose of considering claims duly presented to said Convention, which claims had been left unadjudicated by the former Commission.

The question here to be determined is: Has the present Commission jurisdiction to hear and determine Item No. 6, in the case of the Central and South American Telegraph Co. *v.* The Republic of Chile (Case No. 1)?

In the decision (No. 27) of the former Commission in the case of the Central and South American Telegraph Co. *v.* The Republic of Chile, which decision was rendered on April 7, 1894, *just two days before the expiration of the Commission by time limitation*, it was stated as follows:

"As to Item No. 6, a claim for money received by Chile as agent of the claimant and not paid over to it (said money was received by the present Government of Chile) for $5,850, the evidence being insufficient to enable us to reach a satisfactory conclusion as to the validity of this item, we decline to render any decision, *but without prejudice to the claimant.*"

And in the final report of Hon. George H. Shields, Agent of the United States, it is stated (p. 19) as follows:

"As to the claim for money received by Chile as agent of the claimant and not paid over to it, $5,850, the evidence being insufficient to enable a satisfactory conclusion to be reached as to the validity of this item, the Commission declined to render any decision, *without prejudice to the claimant.*"

The legal definition of the term "*without prejudice*" is that what is said or done is not to affect the rights of the party before the law or his standing in court. It seems inconceivable that the former Commission should have carefully used express language of definite legal signification unless they intended that such language should receive its usual interpretation. It must, therefore, be assumed that they so intended, and, as they expressly declined to render

any decision, it follows that said Item No. 6 is a claim duly presented to the former Commission and left unadjudicated; and that consequently the present Commission has jurisdiction to hear and determine the same.

It is urged by the Hon. Agent for the Republic of Chile that "Item No. 6" is not a "claim" in the meaning of the Convention of 1897. This proposition is hardly tenable. The claim was a separate and distinct one, and separate testimony was filed concerning it. It could perfectly have been filed in a separate memorial, and the fact that the various claims of this Telegraph Company were filed as separate items of one memorial was simply a matter of convenience.

It is also urged that by the words "without prejudice," the Commission intended to remit this claim to the Government or to the courts of Chile for enforcement. If such had been the meaning of the Commission they would undoubtedly have so stated. In the absence of such explicit statement, it can hardly be assumed that the Commission meant to remit this claim to diplomatic negotiations or (even if there were jurisdiction) to the courts of Chile. Leaving aside the point as to whether claims laid before the former Commission did or did not become finally barred from other remedies, it seems plain that the Commission meant that this claim, like all the other claims, "presented to but not finally determined by the Commission, be remitted to the respective Governments of the United States and Chile for such disposition as they may hereafter agree upon." Such disposition has been consummated by the *revival* of the Convention of 1892 in the Convention of 1897, and said claim having been duly presented and left unadjudicated, it must be considered as one of the claims "deemed to come to this Commission in the same condition as they were left by the prior Commission." (Rule II.)

The objection that Item No. 6 was not in a "list of cases" prepared by the Agent seems immaterial, as it is plain that

both Governments had before them the entire records of the proceedings of the Commission.

As already stated, I have no doubt that this Commission has full jurisdiction in the premises.

J. B. PIODA,
Commissioner for Switzerland.
WM. G. GAGE,
Commissioner for the United States.

Dissenting Opinion of Mr. Commissioner Vicuña.

Whereas, the Convention of the 24th of May, 1897, established this Commission exclusively for the purpose of amicably adjusting the claims of citizens of either country against the government of the other, which, on account of lack of time, were not decided by the Commission established by the Convention of August 7, 1892;

Whereas, the former Commission abstained from deciding as to the validity of Item No. 6 of Claim No. 1, not on account of lack of time but by reason of the insufficiency of the evidence, the Commission having stated its decision in the following terms: "The evidence is insufficient to enable us to reach a satisfactory conclusion as to the validity of this item";

Whereas, the claim of the Central and South American Telegraph Company was closed, argued, submitted and adjudicated by the former Commission;

Whereas, Mr. George H. Shields, agent of the United States to the former Commission, enumerated in his official report the claims which had been adjudicated as well as those which had not been adjudicated on account of lack of time, and recommended that only such claims as had not been determined should be remitted to the respective Governments of Chile and the United States for such disposition as they might agree upon;

Whereas, the former Commission unanimously adopted the recommendation for the agent for the United States;

Whereas, the former Commission in their final adjudication, second paragraph, explicitly provided that:

"All claims on the part of citizens of Chile against the United States, and on the part of citizens of the United States against the Republic of Chile, which have been presented to the Commission, except those in which awards have been made, or which have been disallowed or dismissed in manner and form, as will appear in the records of the Commission, by the several separate judgments in writing concerning the same, are hereby remitted, without considera-

tion, on their merits and without any result or determination by the Commission, to the respective Governments of the United States and Chile, for further action and disposition, for the reason that the time limit of the Convention under which this Commission is acting is so short as to prevent the hearing, consideration, and determination of the same by this Commission."

Whereas, the "List of the cases considered and adjudicated by the former Commission," included in the minutes of the forty-fifth and last session of said Commission, held on April 9, 1894, upon which the Commission had rendered their final decision, and which were not remitted to the respective governments for further consideration, is headed by Claim No. 1 of the Central and South American Telegraph Company against Chile for the total sum of $163,858.55, the former Commission thus establishing and declaring that said Claim No. 1 is one of the adjudicated cases which it was not necessary to remit to the respective governments, as only such cases were to be remitted which had not been adjudicated on account of lack of time, for such disposition as they might agree upon.

Whereas, such was also the understanding of the former Commission, as is shown by the following sentence employed by the Honorable President thereof in his closing address: "We are sorry to state that eighteen claims, submitted at the proper time, have been left unadjudicated." If the Honorable President had considered Claim No. 1 as unadjudicated, he would have stated that nineteen claims remained unadjudicated, because without counting Claim No. 1 eighteen unadjudicated claims were remitted by the former Commission to the respective governments.

Whereas, the Governments of Chile and of the United States could not have had in consideration this Case No. 1, which had not been remitted by the former Commission, in subscribing the Convention of May 24, 1897.

Whereas, the Government of Chile has always understood that this Commission, by virtue of the terms of the Conven-

tion of May 24, 1897, is to confine itself to the decision of the claims individually enumerated in the Memorials of Foreign Affairs of Chile, because the cases enumerated therein are the same as those enumerated by Mr. George H. Shields, Agent for the United States to the former Commission, the only ones which remained unadjudicated by the former Commission, the only cases duly presented to the said Commission which the latter did not include in the list of the cases considered and adjudicated by said Commission, the only claims remitted to the respective Governments for such disposition as they might agree upon;

Whereas, Claim No. 1 of the Central and South American Telegraph Company against Chile was decided by the former Commission on April 7, 1894, and, whereas, the sentence contained in the last paragraph of the decision of said Commission relating to Item No. 6 of the said claim: "The evidence is insufficient to enable us to reach a satisfactory conclusion as to the validity of this item, we decline to render any decision, without prejudice to the claimant," can only be interpreted as a reservation to the claimant of a right to prosecute his claim for this item before the Government of Chile or before the tribunals of Chile, and in no manner whatsoever as the remission of the case to the respective governments for such disposition as they might agree upon:

Therefore, the Commissioner for the Republic of Chile declares that, in his judgment, Item No. 6 of Claim No. 1, presented by the Central and South American Telegraph Company to the Commission created by the Convention of August 7, 1892, is not submitted to the present Commission created by the Convention of May 24, 1897.

C. MORLA VICUÑA,
Commissioner for Chile.

Attest:

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

Delivered January 8, 1901.

United States and Chilean Claims Commission.

DECISION No. 2.

JULIA L. WILLIAMS AND FRANK A. ROBINSON *v.* THE REPUBLIC OF CHILE.	*No.* 33.

Decision of the Majority of the Commission Granting Permission to Amend Memorial of Julia L. Williams.

In this case the former Commission made the following order:

"The demurrer having been confessed, on motion of the Honorable Agent of the United States, leave is granted the memorialists to amend their memorials as they may be advised."

Before the expiration of the former Commission, Frank A. Robinson duly amended his memorial. No such amendment, however, was made by Julia L. Williams.

The Honorable Agent for the United States now asks leave to file an amended memorial in the case of Julia L. Williams. The Honorable Agent for Chile objects to such amendment on the ground that the case is not before this Commission.

It is clear that by the former Commission leave was granted the memorialists to amend their memorial as they might be advised. It is also clear that there was no limitation of time within which such amendments should be filed.

The case of "Julia L. Williams and Frank A. Robinson" *et al. v.* The Republic of Chile, claim for $130,600, United States gold coin, was among the cases which could not be made ready for submission to the Commission under the rules thereof within the time limit of the treaty, and if it had been ready could not have been disposed of by the Commission.

On the 9th of April, 1894, the former Commission "ordered that all cases presented to, but not finally determined by, the Commission, be remitted to the respective Governments of the United States and Chile for such disposition as they may hereafter agree upon."

Case No. 33 was one of the cases thus remitted..

The purpose of the Convention of 1897 was "to *revive* the Convention of 1892," for the reason that the former Commission failed through limitation to conclude its task, and, according to the terms of the Convention of 1897, the two Governments "*have agreed to revive the said Convention* of August 7, 1892."

It seems, therefore, that the present Commission is practically a continuation of the former Commission; it stands, as it were, in the shoes of the former Commission, subject only to the limitation that it shall consider only the claims duly presented to the former Commission.

Rule II of the present Commission says:

"All the entries in the prior docket shall be copied into the new docket, *and the claims shall come to this Commission in the same condition as they were left by the prior Commission.*"

The condition of the Williams case as left by the prior Commission was as follows:

The claim had been duly presented to the Commission; a demurrer had been confessed by the Honorable Agent of the United States, and leave had been granted (*without limitation of time*) to the memorialist to amend the memorial as might be advised; no further action was taken in the case by the Commission, but the claim was remitted for such disposition as the two Governments might thereafter agree upon.

It was clearly in the power of the former Commission, before their adjournment, to have dismissed this case for failure to amend, had they so desired or intended. In the case of Charles Watson (No. 15) the former Commission granted the memorialist two months within which to amend his memorial (Decisions, p. 47.) The memorialist having failed to comply with these terms, his memorial was dismissed (Decisions, p. 177).

In the Williams case, on the contrary, no time limitation was given to the leave to amend; the case was not dismissed, as it might have been, before adjournment, but was one of the cases clearly remitted to the respective Governments.

Under these circumstances, as the present Commission is a revival of the former Commission; as, under Rule II, the claims shall come to this Commission in the same condition as they were left by the prior Commission; and as the Williams case was left by the prior Commission with "leave granted to amend as may be advised," I am of opinion that the case is before the present Commission, and that

the motion of the Honorable Agent of the United States to file an amended memorial should be granted.

J. B. PIODA,
Commissioner for Switzerland.
WM. G. GAGE,
Commissioner for the United States.

[No dissenting opinion filed by Mr. Commissioner Vicuña.]

Attest:
JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

Delivered January 8, 1901.

United States and Chilean Claims Commission.

DECISION No. 3.

GEORGE W. L. MAYERS, CLAIMANT, *v.* THE REPUBLIC OF CHILE.	*No.* 32.

Decision of the Commission Dismissing Case.

It appearing to the Commission, from evidence filed by the Republic of Chile, that the nitrate certificates, upon which the foregoing claim is based, have been paid by that Government; therefore, on motion of the Agent for Chile it is

Ordered: That the memorial and claim in said case be, and the same is hereby, dismissed.

J. B. PIODA,
President of the Commission.
WM. G. GAGE,
Commissioner for the United States.
C. MORLA VICUÑA,
Commissioner for Chile.

Attest:
JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

Delivered January 15, 1901.

United States and Chilean Claims Commission.

DECISION No. 4.

HENRY CHAUNCEY *v.* THE REPUBLIC OF CHILE.	*No.* 3.

Decision of Majority of the Commission on Motion to Dismiss for Want of Jurisdiction.

This claim is brought by Henry Chauncey, a citizen of the United States, who alleges that he and two others, also citizens of the United States, are the sole surviving members or copartners of the firm of Alsop & Company.

The claim, which amounts to over a million Bolivian silver dollars, not including interest, is set out at length in a somewhat complicated statement of facts, but, stated briefly, may be said to be grounded upon the interference by Chile with certain property or property rights which had been transferred in 1875 to Alsop & Company, and which rights, thereafter (the said firm of Alsop & Company having gone into liquidation), were embodied in a settlement consisting of and evidenced by a formal agreement or contract executed at La Paz on December 26, 1876, between John Wheelwright, as

liquidating partner of Alsop & Company, and the government of Bolivia.

The sole question to be determined at present is whether or not this Commission can take jurisdiction of this claim.

The Convention of 1897, by which this Commission is created, is a revival of the Convention of 1892. Article I of said Convention is as follows:

"All claims on the part of corporations, companies or private individuals, citizens of the United States, upon the Government of Chile, arising out of acts committed against the persons or property of citizens of the United States * * * shall be referred to three Commissioners," etc.

In view of the above article, what is the status of the claimant, Henry Chauncey?

This appears plainly from the evidence of Henry S. Prevost, taken at Lima, Peru, October 10, 1893, as follows:

"*Sixth.* That since the death of John Wheelwright, aforementioned, deponent likewise, with the consent and by appointment of all the parties interested in the liquidation, has acted, and continues to act, *as the liquidator of the aforesaid firm of Messrs. Alsop & Company;* and that, as such liquidator, *he hereby duly authorizes Henry Chauncey of New York*, aforementioned, and one of the only two other surviving partners of the firm, *to appear in support of the claims of Messrs. Alsop & Co.* against the Republic of Chile."

It appears that the firm of Alsop & Company, formed in 1870, went into liquidation some time in 1875 or 1876, and appointed John Wheelwright its liquidator. The latter having died, Henry S. Prevost succeeded him as such liquidator, and in 1893 he appointed Henry Chauncey as agent to appear in support of the claims of Alsop & Company against the Republic of Chile.

Henry Chauncey, then, is the agent of the substituted liquidator, Henry S. Prevost, and stands in the shoes of the lat-

ter, who, as such substituted liquidator, is the representative of the firm of Alsop & Company.

This brings us to the status of Alsop & Company.

An examination of the articles of association shows that this commercial "Society of Copartnership" was formed under the law of Chile, with its domicile at Valparaiso, under the style or firm name of Alsop & Company, on the 31st day of December, 1870. These articles of incorporation were duly registered at Valparaiso in accordance with the laws of Chile. The society consisted of three active partners (with unlimited liability), two of whom were residents of Valparaiso, though citizens of the United States, and one of whom was a resident and citizen of the United States; and seven special partners (with limited liability), all of whom were residents and citizens of the United States. The society did no business in the United States except through duly appointed special agents.

Under the laws of Chile, and indeed of all countries where the civil law obtains, there are three kinds of societies which may be formed for undertakings which the law describes as commercial. These are as follows:

(1) The society *colectiva*, in which all the members administer the business themselves or by means of an agent elected by common accord. The liability of each member is unlimited.

(2) The society *en comandita*, in which one or more of the members are bound only to the amount of their investment. There are two kinds of societies *en comandita:* simple and with shares.

(3) The society *anonima*, in which the capital is managed by shareholders who are responsible only to the value of their shares.

It is clear, and indeed it is admitted, that Alsop & Company belonged to the class known under the law of Chile as a society *en comandita* simple.

A society *en comandita* simple corresponds very closely

to what is known in the United States as a limited partnership. *There is, however, a fundamental difference.* It is a well-settled principle of law in the United States (as well as in England) that a partnership, either general or limited, is not an entity. Under the common law, a partnership is not like a corporation, an artificial being existing only in contemplation of law. On the other hand, under the law of Chile, which is the civil law, it is a well-settled principle that an association of persons formed for commercial purposes, established by law, becomes an entity—a juridical person.

"The society or company is a contract by which two or more persons agree to join in an enterprise for the purpose of dividing the resulting profits. The society forms *a juridical person distinct from the members considered individually.*"

Code of Chile, Title 28, Art. 2053.

By the law of Chile, therefore, as well as by the law of all the countries where the civil law prevails, the three classes of business organizations, the *colectiva*, the *en comandita*, and the *anonima*, with their subdivisions, ARE IN THE SAME CATEGORY FROM THE POINT OF VIEW OF THE JURIDICAL PERSONALITY. As in the case of incorporated companies in the United States, the individuals composing them are united in one body, and the members are lost in the corporate existence; it is not the individual members but the legal being, which acts and transacts business.

This general principle is laid down by Calvo, as follows:

"Ces trois especes de sociétés différent, quant a leur constitution et a leurs effets, selon que les individus qui les forment, y engagent à la fois leur personne et leur fortune, ou selon qu'ils y engagent seulement un capital limité; mais elles ont ce point d'analogie qu'elles constituent, *toutes les trois, un corps moral* ayant une existence propre, une action particulière, *et qu'elles ne se confondent jamais, tant qu'elles subsistent, avec la personne de leurs associés*, solidaires ou non solidaires, suivant le genre de l'association."

Calvo, Droit International, Vol. 2, p. 399.

In Louisiana, where the civil law prevails, this fundamental principle of the partnership is clearly recognized.

"The partnership once formed becomes in contemplation of law *a moral being, distinct from the persons which compose it. It is a civil person*, which has its peculiar rights and attributes. *Hence, therefore, the partners are not the owners of the partnership property.* The ideal being thus recognized by a fiction of law is the owner."

Smith *v.* McMicken, 3 La. Ann. 322.

"Under the provision of the law of Louisiana *a partnership is, so far as this question of jurisdiction is concerned, placed in the category of corporations.* Both are creations of a State law and domiciled in that State. Both may have members who, by themselves, could not be brought within the jurisdiction of the court. Nevertheless, the Supreme Court has finally settled the doctrine that State corporations, domiciled within the State by which they are created, are, so far as relates to the enforcement of rights of action, *citizens of that State.* The reasoning which leads to this conclusion with reference to corporations leads to *the same conclusion with reference to Louisiana commercial partnerships.*"

Liverpool Navigation Company *v.* Agar, 14 Fed. Rep. 615.

The above principles are well recognized in all countries, including Chile, where the civil law is in force, and are (as the judge said in the case of Smith *v.* McMicken), "illustrated by rules so familiar that it would be unnecessary waste of time to argue in their defence."

When these ten citizens of the United States created the society *en comandita simple* of Alsop & Company at Valparaiso, and sought the privileges and protection of the Chilean law, it must be presumed that their eyes were fully open, not only to the advantages and benefits to be enjoyed thereunder, but also to the disadvantages which might ensue. There was no necessity for such incorporation under the Chilean law unless they needed the privileges

which the Chilean law might confer. They might have formed a partnership, limited or unlimited, or a corporation, under the laws of any of the States of the Union, and carried on their business in Chile through agents. Under such circumstances, the property of the partnership or of the corporation having been injured through acts committed by Chile, there could be no question as to the jurisdiction of this Commission. These ten citizens preferred, doubtless for good and sufficient reason, to create a Chilean society, which, as soon as created, became a juridical entity, to which was attached all the advantages as well as the disadvantages of the civil law.

Let us suppose that a number of Chilean citizens had come to the United States and formed a corporation of which they owned all the shares except the nominal few required by the law of the particular State of its creation to be held by local directors, and that, doing business in Chile, the property of this corporation were injured or destroyed by acts committed by Chile. In such a case, the corporation, being a citizen of the United States, this Commission could unquestionably take jurisdiction, even though practically all the stock of the corporation belonged to Chilean citizens domiciled in Chile.

This principle *that a juridical person takes the nationality of the country where it is created* is uniformly accepted by international law:

"From the fact that all the members of a corporation are foreigners, it does not absolutely follow that the corporation is a foreigner. We must not confuse the juridical qualities of the members, as private individuals, with the juridical qualities of the moral existence forming the collectivity. * * *

"*It may, therefore, be said that moral persons borrow nationality of the State or of the Legislature from which they have received their existence.*

"Thus, the moral persons created by the French law are

French. On the contrary, those in whose birth the foreign legislature intervenes are foreigners."

Calvo, International Law, Vol. 2, p. 227.

"The members of a foreign corporation are conclusively presumed to be aliens for the purpose of sustaining the jurisdiction of the Circuit Court over a suit brought by or against such a corporation."

2 Wharton's Digest of International Law, p. 528.

In his project for an international code, David Dudley Field summarizes the principle as follows:

"Corporations *and other moral persons* have no existence beyond the jurisdiction of the power by whose act they exist; they have no other capacity than that which is conferred upon them by that power." Art. 545.

In the case of the Compania Unida de Navegacion, Mr. Seward, Secretary of State, declined to present a claim to Columbia on behalf of the United States citizens, although they owned almost half the interest in the Company. He said:

"The association, as an entity, is to be assimilated to a citizen of Colombia. If it has sustained a wrong, is it not for it to pursue such remedy as it may have, as a private Colombian would be obliged to do, without the aid of any government external to Colombia?"

And the Supreme Court of the United States has held that:

"All the stockholders of a corporation are, for the purpose of jurisdiction, conclusively presumed to be citizens of the State which created it."

Muller *v.* Dows, 94 U. S. 444.

Applying the principles hereinbefore stated to the question of jurisdiction, it seems clear that the Chilean society of Alsop & Company would not have the right to appear

before this Commission, and, if this is the case, would the society of Alsop & Company in liquidation, through its liquidator, Henry S. Prevost, or through Henry Chauncey, the agent of the liquidator, have any better right?

It is asserted in the claimant's brief and it was strenuously argued by the Honorable Agent for the United States, that the claim herein presented is not the claim of Alsop & Company, and that Alsop & Company had no existence after December 31, 1873.

Upon a careful examination, it seems clear that neither of these contentions can hold.

The claim filed by Henry Chauncey is always in the memorials, in the testimony, in the claimant's briefs, described as the claim of Alsop & Company. This statement is repeated twenty or more times. For instance, in the Treaty of 1895, filed by claimant in support of his memorial, the claim of Alsop & Company is described as "the credit in favor of Don Pedro Lopez Gama, represented at the present time by the house of Alsop & Company, of Valparaiso." And again, in one of his briefs: "This claim of Alsop & Company is a legal debt of Chile." And again, in his supplemental memorial, the claimant says: "The Government of the Republic of Chile on divers occasions and by means of treaties, protocols, and official communications of its duly constituted officers or representatives, has recognized its liability for and assumed the payment of the claim of said Alsop & Company, to-wit, the claim mentioned in the original memorial herein.

If this were not the claim of Alsop & Company, or if Alsop & Company were not in existence, could it be contended that the Republic of Chile would "assume the payment of the claim of said Alsop & Company?"

Furthermore, the claimant, Henry Chauncey himself, in his evidence, states that he is still a member of the firm of Alsop & Company.

Nor is it a correct statement that the society of Alsop & Company went "into liquidation before the expiration of the term of three years."

Although by Article XIII of the "Society of copartnership," the society of Alsop & Company was established on December 31, 1870, in Valparaiso, for the term of three years, yet distinct provisions are made by Article XII for the carrying on of the business for the account of the majority of the parties to the contract "in case the society should be continued after the 31st of December, 1873"; and by the same article it is provided that "the special partners are obliged to notify the active partners on or before the first of April, 1873, of their intention to close the business of the house on the 31st of December, or to continue it for another term." In case of the death of any of the partners in Valparaiso, Article IX provides that "the special partners shall have the option of considering this contract terminated at once or to continue it, naming or not, as it may best suit them, another person to represent the deceased partner."

No evidence whatever has been offered to show that at the death of any of the partners, the option of "considering this contract terminated at once" was exercised, as provided by Article IX. No evidence has been offered to show that the notice by the special partners was given "of their intention to close the business of the house on December 31st," as provided by Article XII.

Under such circumstances it must be assumed that the society of Alsop & Company continued in active business after December 31, 1873, and that such is the case is conclusively proved by the averment of the claimant's memorial, which states that "the said Pedro Lopez Gama, on or about the 14th of April, 1875, assigned and transferred to the said firm of Alsop & Company certain claims and rights which he had previously collected from Bolivia."

The society of Alsop & Company was therefore in active business in April, 1875.

It appears from the same page of the claimant's memorial "that thereafter (after April, 1875), the said firm of Alsop &

Company having gone into liquidation, the said John Wheelwright * * * succeeded in effecting a settlement with the government of Bolivia of the said claims and rights so assigned to said firm of Alsop & Company, which said settlement consisted of and was evidenced by a formal agreement or contract duly executed by and between the government of Bolivia and said John Wheelwright, *as liquidating partner* and representative of Alsop & Company."

The society of Alsop & Company went into liquidation, therefore, some time after April, 1875, and it is clear that it has been in liquidation ever since, is still in liquidation, and will probably remain in liquidation until after the claims or rights assigned to the society are paid to the liquidator.

The fact that Alsop & Company is still in liquidation is shown by repeated statements, too numerous to mention, both in the memorials, in the testimony, and in the briefs of the claimant.

John Wheelwright, the original liquidator, having died, he was succeeded as liquidator by Henry S. Prevost, and in the testimony of the latter, taken in 1893, the deponent states that he "*continues to act as the liquidator of the aforesaid firm of Messrs. Alsop & Company*, and that *as such liquidator*, he hereby duly authorizes Henry Chauncey * * * to appear in support of the claims of Alsop & Company against the Republic of Chile.

Henry Chauncey, therefore, is, as already stated, the agent of the present liquidator of the society of Alsop & Company in liquidation.

Now what is the status of a commercial society in liquidation and of its liquidator?

It is a well settled principle of the civil law that commercial societies continue to exist in liquidation just as a corporation in the United States continues to exist during liquidation.

This principle is declared in most of the codes and is recognized by the courts in all countries where the civil law is in force.

For instance, the Code of Belgium says:

"Commercial societies are regarded as existing after their dissolution for purposes of liquidation."
Code of Belgium, Art. 111.

And by the Commercial Code of Japan:

"Even after the dissolution, a partnership is deemed to continue in existence so far as is necessary for purposes of liquidation."
Commercial Code of Japan, Ch. 2, par. 6, Art. 84.

And Article 410 of the Commercial Code of Chile, says:

"The liquidator is the true representative of the society."

In a leading case in the Cour d'Appel, of Paris, the court said:

"Considering that this proposition is not true, that the liquidator is not the agent of the members, but that he is the representative of the society itself which, although dissolved, continues to exist for the purposes of liquidation, and to form a moral person having rights completely distinct from those members who compose it."

And in the Court of Appeals of Orleans in the case of Société l'Industrielle, C. Sevin, the court said:

"The société nevertheless *preserves its moral personality until the completion of the liquidation.*"

On this point, Lyon-Caen & Renault, the authors of the leading treatise on commercial law, state as follows:

"In order to avoid these results, jurisprudence has admitted that in spite of their dissolution *the dissolved society exists still as a moral being for the purpose of its liquidation* as long as it is necessary to protect the rights acquired and not to interfere with the operations of the liquidation.

"The death, the failure, the loss of civil rights of a member, taking place after dissolution does not cause the function of the liquidator to cease. *The latter represents a moral being which survives the dissolution*, and not the members considered as individuals."

(Lyon-Caen & Renault, Droit Commercial, Tome 2, pp. 241 243.)

It is plain that the question of denationalization or expatriation of the individual does not enter here. If any one of the partners of the society of Alsop & Company had been injured in person, or in his private property, by acts committed by Chile, his right to redress before this Commission, under the terms of Article 1 of the Convention of 1892, would have remained unimpaired.

It was under such circumstances that a Commission, under a Convention (1880) between the United States and France awarded damages to individual partners in the case of the Le Mores (cited by the Honorable Agent of the United States. See 4 Mores Int. Arb. p. 3310). The two Le More brothers, citizens of France and partners in the Louisiana firm of Gautherin & Company, were arrested in 1862 by General Butler on the ground of having given aid and comfort to the enemies of the United States. One was imprisoned with much indignity and suffering, while the other was simply imprisoned. The Commission held that the Le Mores were not guilty of giving aid and comfort to the enemies of the United States; that it was a case of unusual and arbitrary conduct on the part of General Butler, who had no right to inflict punishment ("unnecessary, extreme, and much to severe") on the claimants, and consequently the Commission awarded heavy damages to each of the claimants for his imprisonment.

Such award was eminently just and proper, and is not in conflict with any of the principles or conclusions enunciated herein.

Several other cases were cited by the special Counsel of

the United States in support of the contention that various commissioners or arbitrators have maintained jurisdiction of the claims of the individual partner, as distinct from the society, for injury to his interest in the partnership property.

The principal case cited is the notorious Cerruti claim. In this case the whole property of the firm of Cerruti & Company, a society *en comandita simple* of Colombia, was confiscated or destroyed by the government of Colombia on the alleged ground that one of the members of the firm, Cerruti, an Italian citizen (who was owner of practically the whole partnership property), had violated neutrality during a revolution in Colombia. In addition to the confiscation and destruction, great outrages, including imprisonment were heaped upon Cerruti, and the situation finally grew so acute as to cause a cessation of diplomatic relations between Italy and Colombia. Finally, the government of Colombia entered into a convention to settle once and for all this matter, which had been for years a matter of constant irritation to the two governments, and had kept their relation strained. As Calvo says (Int. Law, Vol. 3, p. 426): "This case presents this particular feature, that the contending parties came to an agreement to prepare a compromise or a preliminary convention in which they settled the points on which the mediator should pass." Thus, when "the matter of the arbitration of the claim of the government of Italy (Cerruti was *not* the claimant) against the government of the Republic of Colombia" was presented to the arbitrator, Grover Cleveland, it had already been settled by the preliminaries that Colombia admitted that in the movable and immovable property and credits to be returned to Cerruti should be included those which constituted the property of the firm of Cerruti & Company. (See questions regarding the preliminary bases of the negotiations for settling the Cerruti question between the Italian Minister of Foreign Affairs and General Posada, of Colombia; Italian Green Book, March 13, 1900.)

At first objection was made by Colombia to the effect that E. Cerruti & Co., being a society *en comandita simple*, having a juridical entity, was, in fact, a Colombian citizen, and therefore that no indemnity could be demanded by Cerruti personally for damages sustained by the property of Cerruti & Co. This position was practically abandoned, for Colombia had, in equity at least, forfeited the right to such a position by injuring Cerruti, for political and individual reasons, not only in all his private interests, but also in all his interests in the partnership property as well.

Furthermore, there was vested in the arbitrator, Grover Cleveland, "full power and authority and jurisdiction to do and perform and cause to be performed all things *without any limitation whatsoever*," and this fact is twice mentioned by the arbitrator in his award.

The Cerruti case, therefore, was peculiar and unique, one of acute international complication, in which the preliminary questions had been discussed for years, and in which, also, the jurisdiction of the arbitrator was not restricted, as in this case, but was without any limitation whatsoever.

The other cases cited by the Special Counsel of the United States can be differentiated from the present case; in any event they are not of sufficient weight to shake the principles enunciated above and illustrated by such cases directly in point as that of the Compania Unida de Navegacion in which Mr. Seward, Secretary of State, declared that a society, as an entity, is to be assimilated to a citizen of the State of its creation.

From the facts and principles hereinbefore stated, it results, then:

That the claimant, Henry Chauncey is the agent of Henry S. Prevost, who is the substituted liquidator of the firm of Alsop & Company in liquidation;

That Alsop & Company is a society "*en comandita simple*," duly created, incorporated, and registered under the Chilean law with all the formalities of that law, and domiciled in Chile;

That a society "*en comandita simple*" (precisely like a society anonima) forms a juridical person distinct from the members considered individually;

That under the recognized principles of international law, a juridical or moral person borrows nationality of the State or legislature from which it has received its existence;

That under the recognized principals of civil law, as applied to commercial societies, such societies continue to exist during liquidation;

That Alsop & Company in liquidation is still Alsop & Company;

That Alsop & Company being a Chilean society is a citizen of Chile;

And, therefore, that under Article 1 of the Convention of 1892, this Commission has no jurisdiction over this claim.

/By this conclusion it is not denied that certain cases may arise (like the Cerruti case) in which redress may justly be granted by means of diplomatic intervention to an individual member of a society for injury to the partnership property. The demurrer is sustained wholly upon the ground that Alsop & Company, in liquidation, being a citizen of Chile, this Commission, under Article 1 of the Convention of 1892, has no jurisdiction to entertain the claim. The case is dismissed, therefore, without prejudice, however, to any rights which the claimant, or claimants, or Alsop & Company, or its liquidator may have. either by diplomatic intervention or before the Government of Chile, or the courts of Chile. Nor are the merits of the claim in any way prejudiced by this decision. According to the brief of the Honorable Agent of Chile, it is declared that this claim

"Is among the liabilities that the Government of Chile engage to pay for the account of Bolivia. * * * The Chilean Government has always regarded it, and does still regard it, as a liability on the part of Bolivia towards the claimant; and in order to induce the Bolivian government to sign the definite treaty of peace, which has been nego-

tiated for many years, the Chilean Government offers to meet this and other claims as part of the payment or consideration which it offers to Bolivia for the signature of the treaty. This has always been the position of the Chilean Government, and is its position to-day, and if Bolivia signs the treaty, the claim of Alsop & Company, as well as the other claims mentioned, will be promptly paid under the treaty engagement, as a relief to Bolivia from the liabilities which that government has incurred and for the account of Bolivia."

The claimant is, therefore, remitted for relief to the Government of Chile, whose assurances are thus given, and the case is dismissed.

J. B. PIODA,
The Commissioner for Switzerland.

C. MORLA VICUÑA,
The Commissioner for Chile.

Dissenting Opinion of Mr. Commissioner Gage.

From my point of view of the questions in the above case I find myself unable to concur in the decision of my honorable colleagues and dissent therefrom for the reasons herein stated. I refer to their opinion for a very clear and complete statement of the case.

1. The entire objection of the Honorable Agent for Chile to the jurisdiction of the Commission in this case, is covered by Point III of his motion, which reads as follows:

"Alsop & Company is not an American copartnership, but a Chilean society; and as such Chilean society, Alsop & Company is a juridical person and a citizen of the Republic of Chile."

The questions, pending between the high contracting parties to the Convention of August 7, 1892, under which we are acting had been, many of them, of very long standing.

Their purpose in entering into that Convention is expressed in the preamble thereof, *i. e.*, "to settle amicably the claims made by the 'citizens' of either country against the other, growing out of acts committed by the civil or military authorities of either country," etc.

Article I of the Convention reads: "All claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Chile, arising out of acts committed against the person or property of citizens of the United States * * * shall be referred to three commissioners, etc."

It was the evident intention of both countries to furnish a tribunal to which *all* claims of the "*citizens*" of either, of the character named, could be referred for decision.

The words "corporations, companies or private individuals," was intended to embrace *all* the "*citizens*" of either country who might have such claims.

The members of the firm of Alsop & Company were

"private individuals, citizens of the United States." The claimants represent them. Therefore, if the firm of Alsop & Company does not belong to one of the classes of "citizens" of Chile mentioned in the Convention, and which classes were intended to include *all* of its "citizens," it was not a citizen of Chile, within the meaning of the Convention, and the individual members, "private citizens of the United States," are entitled to prefer this claim before this Convention.

We must ascertain, then, whether Alsop & Company was a "corporation or company," a "*citizen* of Chile," within the meaning of the Convention. To do this we must ascertain what the attributes and characteristics of a corporation or company are which give to it citizenship in a country.

2. We should bear in mind that, in the words of Article IV of the Convention, the Commission is required to "determine all of the questions which come before it, according to their best judgment, and according to *public law*, justice and equity."

It is well to remember, also, the fact that there have been eight Conventions between the United States and other countries, beginning with the year 1853 and coming down to 1880, in which identically the same language has been used as in this Convention in reference to the claims that were to be presented to each Commission on the part of the United States. They are as follows:

Country.	*Year.*
Great Britain	1853 and 1871
Colombia	1857
Ecuador	1864
Mexico	1868
Peru	1869
Venezuela	1869
France	1880

During that period of thirty-nine years, between 1853 and

1892, the date of this Convention, there must necessarily have been a large number of claims similar to this, coming before the Commissions acting under those Conventions, and it is significant that while six of those Conventions were with countries using the civil law, in no case has a claim been rejected for the reason urged here, although it is apparent from an examination of the cases that if it had been considered a tenable objection, it might have been urged frequently before those various Commissions, and, as we will find later, it has been occasionally raised, but never decided in favor of the respondent Government.

3. Under the terms of the Convention, only citizens of the United States have a right to present claims to this Convention on behalf of the United States, and only citizens of Chile on behalf of Chile. The word "citizens" in reference to "private individuals," has constantly received very strict construction before these various Commissions.

Dr. Lieber says on this subject, in the case of Baron, in construing these same words in the Convention with Mexico above referred to:

"It remains to answer this question: Does or does not our instrument take the word citizen in the quoted passage, in its fullest sense, including the idea of *allegiance?* * * * As to the mere *domicil* conferring citizenship, the question has been often discussed. It is possible that a person possesses a permanent dwelling-place and domestic establishment (domicil), in a country, and has settled there, without entering as a member into its political society, and in the same manner a person may possess real property in a country and cultivate the land without necessarily becoming a citizen.

"I am convinced that the word citizen is taken in the Convention of 1868 in its full and definite sense, and not in its conditional and limited sense. But no one can be a *citizen* in the complete sense of the word (in which it means, indeed, absolute *incorporation* in, and *assimilation* with the *political* society), of two States or governments at one and the same time."

This language was used with reference to a claim presented by two persons who were copartners in the house of Baron, Forbes & Co., who admitted that they were British citizens, but contended that the company of Baron, Forbes & Co. was a Mexican company, hence a "juridical person" and a Mexican citizen, and entitled to recover, as such, before said Commission, notwithstanding two of the individuals composing the company were admitted to be British subjects. Dr. Lieber overruled the contention and dismissed the claim.

Moore Arbitration, p. 2521, &c.

One author says the "test of citizenship, according to the Constitutional jurists, other than those of England and the United States, is the right of being eligible as an elector."

Lawrence's Wheaton, p. 893.

It is apparent, then, that the word "citizen," as qualifying the words "corporations" and "companies," is not used in the same sense as when it qualifies the words private individuals.

4. What, then, is the meaning of the word citizens when qualifying the words "corporations" and "companies," in this Convention? The words in the Spanish version are "*corporaciones*" and "*compañías*." To determine this question we must first consider what a corporation or company is; second, what attributes it has that give to it citizenship within the meaning of international law and of this Convention.

"A corporation is defined as an artificial person like the State." (Cook, Corporations, 3d Edition, par. 1.) "It is an artificial *being*, invisible, intangible and existing only in contemplation of law, it possesses only those properties which the *charter* of its creation confers upon it, either expressly or incidentally, to its very existence. These are such as are supposed to best effect the objects for which it was

created. Among the most important are "*immortality*," and, if the expression may be allowed, individuality, properties by which a succession of many persons are considered as the same, and may act as a single individual. By these means a *perpetual succession* of individuals are capable of acting for the promotion of the particular objects, like one immortal being." (Marshall, C. J., Dartmouth College Case, 4th Wheaton, 636.)

In the broadest sense of the word, the "king" and the "State" are corporations. The individual may perish or be incapacitated, but the "king" and the "State" continue. The first charters granted to corporations were granted by the king for the government of cities. (Angel & Ames on Corp., 11th Ed., par. 22, p. 15.) Thus the sovereign first *delegated* by his *charter* to these corporations the authority to govern a portion of his dominion. They partook necessarily and naturally of the same attributes as the State itself; one, if not the chief of these, was "*perpetual succession*."

These public corporations are so essentially a part of the sovereignty from which they derive their power, their abode is so absolutely fixed, their "immortality," in the corporate sense, is so perpetual that it is self-evident they owe allegiance to, have the nationality of, and are, in that sense, citizens of that sovereign.

"And from the conception of such an institution (*i. e.*, municipality), grew the idea of 'private corporations.'" (An. & Am. on Corp., 11th Ed., par. 22, p. 15.) These partook of the same attributes, and, for like reasons, have the nationality of the sovereign who gave them their *charter* or patent, and who became, in a sense, *sponsor* for them, and was, therefore, bound to protect them in their enterprises.

These charters to private corporations were granted on the theory that such organizations were for the "public good." The *public* benefit is deemed a sufficient consideration for a grant of corporate privileges. (An. & Am., par. 13, p. 7.) The principle is, and has so been laid down by

Domat, that the design of a corporation is to provide for some good that is useful to the public. (An. and Am., p. 13, n. 4. 1st Bl. Com., p. 467.)

It is held "a corporation can be *created* only by the *sovereign* power." (Cook, Corp., 11th Ed., par. 1, Am. and Eng. Encl., 7 vol., p. 639). "It is *created* by *charter*, formerly granted by the king, later by the legislature." (Cook, Corp., par. 2.) A business corporation is a fictitious person, *created* either under a special or general charter. It has the power of indefinite succession, with the right to issue certificates of stock to the owners of its shares, the stock being transferable by the holder. It may sue or be sued, and transact all of its business in its corporate name. The shareholders, except under special provisions of statute, and to a limited extent, are not responsible for its debts, nor at all for its torts. The death or disability of a stockholder in no way affects it.

"The powers of a corporation are *like its corporate existence*, derived from the legislature, and are *not*, as in the case of a *copartnership*, co-extensive with the powers of the individuals who compose it. Its charter, therefore, is the *measure* of its power, and it can lawfully exercise only such powers as are expressly conferred upon it, by that instrument, or necessarily implied therefrom." 7th A. and E. Encl. Law, 2d Ed., vol. 7, p. 695; August Bank *v.* Earle, 13 Peters, 587; N. Y. Fire Ins. Co. *v.* Ely, 5th Conn., p. 560. The powers of a corporation cannot be enlarged by its *by-laws*. (7th A. and E. Encl., 2d Ed., 698; Brewster *v.* Hartley, 37 Calf. 15.) A corporation cannot, *like a partnership, be constituted by agreement of the parties, but only by authority of the sovereign power.* 1st Bl. Com. 474, Oliver *v.* L. L. & G., 100 Mass. 531.

We see, then, that a corporation is dependent for all its powers, absolutely upon its charter. It is the *sovereign* that confers upon it life. It is a *creature* of the State, which, through its *charter*, gives it being, and upon which it is de-

pendent for its very existence. Usually it is vested with all of the rights and powers, for the conduct of its business and affairs, which a natural person possesses. It is frequently vested with the power of eminent domain, of collecting tolls and fares, issuing bank-notes, and other privileges which it would be utterly impracticable to confer on any being not having "perpetual succession."

The migratory nature of its shares, changing day by day from hand to hand, now held by the citizens of one country and to-morrow by the citizens of a dozen different countries, makes it absolutely impracticable for the interests of the stockholders to be guarded and protected from injury and wrong by any, except the government of its creation.

This is one of the most cogent reasons why it must have the nationality of that country (a reason entirely inapplicable to copartnership).

In the language of Dr. Lieber, in the case of Baron, Forbes & Co., hereinbefore cited, "it is absolutely incorporated in and *assimilated* with the political society which gives it being." Hence it has nationality - the nationality of the country which gives it birth, and it is therefore treated as a citizen of that country within the meaning of this and similar conventions.

5. In the Spanish version of the treaty, as we have stated, "corporations" and "companies" are called "corporaciones" and "compañias." If we find that Chile has, in her Code, "associations," which are there called "corporaciones" and others called "compañias," and which have all the characteristics and attributes of our corporations, then they have true nationality, for the reasons we have pointed out, and they, and they *only* are the "corporaciones" and "compañias" mentioned in the Convention.

The "corporaciones" of the Convention are described in Articles 545 to 564 of the Chilean Civil Code.

They provide [illegible] Article 546 provides "Foundations or corporations which have not been established by vir-

tue of a law, or which have not been *approved* by the *President* of the *Republic*, with the advice and consent of the Council of State, are not juridical persons.

Article 547. Industrial *copartnerships* are not included in the provisions of this title.

Article 548. The statutes (charters) of corporations, drawn up by themselves, *shall be submitted for approval* to the *President* of the *Republic*, in concurrence of the Council of State.

Article 549 provides that the property of a corporation does not belong to the individual members, and they are not liable for the debts of the corporation. * * * If the corporation has no legal existence according to Article 546, their collective acts are binding upon each and every one of their members *in solido*. Article 550 provides for the government of the corporation by a majority of its stockholders. Article 556 provides that corporations may acquire property of all kinds.

Article 559 provides that corporations cannot dissolve themselves without the approval of the authority which legitimatized their existence. But they may be dissolved by such authority or by provision of the charter, notwithstanding the wishes of the members to the contrary.

It appears from these extracts from the Chilean Code that these "corporaciones" have substantially the same powers and limitations as our corporations; that they *derive* their power from the *special authority granted them by the President and Council of State*, and that they *cannot change* their charter *without* the *approval* of the *same power*; that they have *perpetual succession* and are not affected by the death or incapacity of a member or members, and that they have the same characteristics and attributes as the corporations and companies of the common law, which have nationality. These, then, are the "corporaciones" which are called corporations in the English version, and for the reasons we have given they have the nationality of Chile.

6. It was assumed in respondent's brief, that the words "corporations and companies" mean the same thing, the first being more frequently used, it is there said, in the United States, and the latter in England. In some authorities they are treated as practically identical.

In Angel & Ames on Corporations, these words are used interchangeably, *but only in the sense* that the "company" has all the attributes which, we have pointed out, belong to a true corporation.

There are, however, associations both in Great Britain and the United States which are usually termed "companies" in the United States, and which are, properly speaking, *joint stock companies.* They are partnerships as to the liability of the members, but they have certificates of stock representing their shares which are transferable. But in many of the United States the law in reference to joint stock companies has been so modified as to give them all the powers and privileges of a true corporation, and where that is done the statutes, and in some of the States, the constitution provides that they shall be held to be corporations.

These latter companies, which have the essential attributes of a corporation, are the only companies in the United States (except business corporations), which can have nationality, and hence they are the "companies" mentioned in the Convention.

Chile, by its code, has provided for exactly this kind of an association, having distinctly and clearly all the essential attributes of a "corporation" as known to the common, and, in fact, to the civil law. To show what these provisions are we make the following extracts from that code:

Article 2061 states, in defining the different kinds of "*companias*" it is a joint stock company when the common capital is contributed by shareholders who are liable only for the amount represented by the shares they hold, and when the partnership is not known by the name of an individual, but

designated by the business in which the company is engaged.

In the *Commercial* Code, under Title VII, "*Sociedad Anónima*," it is provided: Article 427: "The *Sociedad Anónima* exists by virtue of a *decree* of the *President* of the Republic which authorizes them. This authorization is equally necessary in order to modify their statutes (charters) in order to continue the companies, which have been constituted for a fixed term, and in order to dissolve them before the time or period stipulated, or in other cases not provided for by law."

These companies are *created* by the *decree* of the President (the Sovereign) approving their *charters*. They have a perpetual succession, just like any other corporation; their stock is transferable like a corporation, and, as will be seen by the foregoing quotations from the Chilean Code, they are a true business corporation, or joint stock company possessing all the powers and attributes of our corporation, and they are dependent absolutely upon the charter granted by the President of the Republic for all their powers and existence, just as is our corporation. And they have, therefore, undoubted nationality. They are the only associations, known to the Chilean Code, except the "corporaciones" mentioned above, which *have* the attributes and characteristics of a "corporation." They are included in the title of the Chilean Commercial Code which treats of "La Sociedad o Compania," and are unquestionably the "*companias*" *referred to in the treaty, by that name.*

It is admitted by all that Alsop & Company did not belong to this "*Compania Anonima*," but to the association known under the Chilean Code as "*en comandita simple*."

7. These business "*corporations*" and "*companies*" are very different, however, from a general or special partnership, such as those described in Articles 2053 to 2071 and Articles 2098–2103 of the Chilean Civil Code, and to which it is admitted Alsop & Company belonged. The partnerships

there described are true partnerships, just as absolutely and effectively and having the same characteristics and attributes as those designated by that name in the United States.

They have none of the essential characteristics and attributes of a true corporation or of the "corporaciones" and "compañias anónimas."

The following is a synopsis of that portion of the Civil Code of Chile which treats of these associations, which shows that there is no essential difference between them and partnerships under the common law except the fact that they may sue in their company name.

"Article 2053. A partnership or company is a *contract* in which two or more persons agree to join something in common for the purpose of dividing among themselves the profits arising therefrom. A partnership constitutes a juridical person distinct from the parties considered individually. Article 2054 provides that in the deliberation of the partners a majority of votes shall be decisive. It also provides what shall constitute a majority where the contract does not state. Article 2058 provides that the nullity of the partnership agreement shall not effect the right of action of third persons against each and every one of the partners on account of the transactions of the partnership. Article 2061 provides that a partnership, whether civil or commercial, may be general, limited, or a joint stock company with limited liabilities. It is a general partnership when all the partners take part in the management or when it is managed by persons selected by common consent. It is a limited partnership when one or more of the partners limit their liability to the amount of the subscription. We have hereinbefore quoted the provision as to joint stock companies. Article 2063 provides that general partnerships may have one or more special partners. Article 2065 provides, among other things, that if the business for which it is organized is of limited duration that it shall be understood to have been entered into with reference to that period. Article 2066 states that the contracting parties may fix the rules for the division of profits and losses. Article 2068 provides that in the absence of express stipulations that it shall be understood the division of profits and losses shall be made in proportionate

amount, as each partner may have contributed to the common capital. Article 2098 provides that the partnership is dissolved by the expiration of the period for which it is established. Article 2099 provides that partnerships shall be dissolved by the termination of the business for which it was entered into, or by the arrival of the period fixed in the articles of copartnership. Article 2100 provides that insolvency shall work dissolution. Article 2103 provides that a partnership is also dissolved by the natural or civil death of any of the partners, except when by provision of law or by the contract of the partnership, said partnership is continued between the surviving partners with the heirs of the deceased or without them."

8. The limited copartnerships, such as that provided for in the foregoing chapter, and to which class Alsop & Company belonged, is familiar to the business world and has been for centuries. In this country it was *borrowed* from the French code. (Ames *v.* Downing, 1st Brad. N. Y., 229; 3d Kent, Com. 36.) Under the name of "*Societé en commandite*" it has existed since the Middle Ages. "*It was always considered a* PROPER *partnership.*" (See same case, where will be found a full history of limited copartnerships and full citations from the civil law, showing that there it is considered as a partnership and as a PARTNERSHIP SOLELY.)

The provisions for the formation, termination, dissolution, registration, and liability of general and special partners found in the Code of Chile are almost identical with the statutes on that subject for the District of Columbia, and in the Code of California. Practically the same provisions as to limited partnerships are found in the Code of New York, in the Statutes of Michigan, and in nearly all the States of the Union.

The striking similarity between these and the Chilean Code in reference to this subject show conclusively that they all have a common origin, and that a limited partnership in Chile is no other or different thing from a limited partnership in any of the United States, except that in Chile

it is given the right to sue in its company name. Certainly these limited partnerships do not derive their powers from their charter (for they have none) nor from the code.

Neither would any one claim that because the statute provides regulations for these limited partnerships, that it therefore conferred nationality upon the partnership.

That they are *not corporations* has been decided in a case in the State of New York, in which it was stated that "the company is domiciled in New York State, and constituted by written articles of association, whereby its capital is divided into shares, its shares are transferable. The death of a shareholder will not work a dissolution. The business is conducted by a board of managers. The property is vested in the exclusive possession of three trustees, and all legal proceedings are conducted in the name of the president or these trustees. Thus it is a *quasi corporation*, as between the members, *by* their voluntary *contract*. As to third persons it is a partnership. Inasmuch as a corporation is always created by *charter*, while this company is *self-constituted*," held this was a copartnership. (Hoey *v.* Coleman, 46 Fed. Rep. 241.)

There are these clear distinctions between a commercial corporation and a limited copartnership. The former, as we have pointed out, derives all its powers from the sovereign; the latter depends for its powers and existence upon the agreement of the partners; the former has corporate "immortality"; the latter ceases to exist by the civil or natural death of a general partner, and may be dissolved for other causes; in the former the stockholders are not liable for the debts or torts of the company; in the latter the partners are, even in Chile, eventually.

It will also be observed that, by Article 2058, in case of the nullity of the partnership for any reason, the right of action of third parties on account of all the transactions of the partnership, exists *against each* and *every one* of the partners.

9. It appears, then, that this Chilean Code does not attempt,

any more than the codes in the various States of the American Union, to delegate any power or authority to the copartnership, and makes but few regulations for it. In fact, the partnership is there, as elsewhere, exclusively a matter of contract, just as much so as under the common law.

These copartnerships, then, are clearly distinguishable from the corporations or companies of the common law which have nationality, and also from the "corporaciones" and the "compania anonima" of the Chilean Code. There are these clear distinctions between the "*corporaciones*" and "*compania anonima*" and the general and limited copartnerships of that code. It is not necessary for either the general or limited copartnerships, the "*colectiva*" or the "*en comandita simple*," to prepare and *submit* their charters to the *President* of the *Republic* and the Council of State, and procure a DECREE from them before they are empowered to do any business; but this *is* required of the "corporaciones" and the "compania anonima." (See Civil Code, 548, and Commercial Code, Article 427, *ante*.) The partnerships may be dissolved by act of the parties, or their agreement may be changed by their own contract, by simply filing the amended contract, without the necessity of any *decree*, and without power in any one to refuse the registry thereof. But the "corporaciones" and "compania anonima" cannot be dissolved by the corporators themselves, but only in the manner in which they were formed, or by the action of a court. The former has "perpetual succession," the latter has not. In the former the members are not liable for the debts or acts of the company, in the latter they are, eventually.

It has been well said that "the difference between a company (corporation) established for private hazard and profit by an act or *charter* of incorporation, and a copartnership, is obvious and striking. The latter is simply a *voluntary contract*, or the result of such a contract, whereby two or more persons agree to combine their property or labor, or

both, for the purpose of a common undertaking, and the acquisition of a common profit; and the gain or loss is to be proportionately shared between them. But this definition greatly falls short of a company established as a body corporate, which, though originating in a voluntary contract, is the result, not only of that, but of its *confirmation*, by special legislative authority. This confirmation is *indispensable* to enable the parties to the compact *to transmit their property in succession*." (An. and Am. Corp., 11th Ed., par. 41.)

10. My learned colleagues, however, contend that under the law of Chile it is a well-settled principle that an association of persons formed for commercial purposes, established by law, becomes an entity, "a juridical person." To sustain this proposition they cite Article 2053, quoted *ante*, and then say that "by the law of Chile, therefore, as well as by the law of all the countries where the civil law prevails, the *three* classes of business companies, the '*colectiva*,' '*en comandita*,' and the '*anónima*,' *are in the same category* from the point of view of a '*juridical personality*.' As in the case of incorporated companies of the United States, the individuals composing them are united into one body and they are lost in the corporate existence; it is not the individual members but the legal being which acts and transacts business." They thereupon assume that because it is a "juridical person" that both the general and limited partnerships have the same attributes as corporations under the common law.

The first error in this statement is, as we have already pointed out, that they are not *created* or established by law, but as appears by the very paragraph quoted, Article 2053, are established by the *contract* of the parties; they are not established by a *charter* which confers upon them all the powers and privileges which they have, as are corporations in the United States, nor are they established, as in the case of "corporaciones" and "anonima," in Chile, by the *decree* of the President and Council of State.

The fact that the laws which regulate a partnership in Chile, in the District of Columbia, in California, and Louisiana, are codified, and that the laws which regulate a general partnership in most of the United States are not codified, has no significance.

Because the law regulating them is codified, it does not follow that they are *created* by that law, when the very law itself points out in its first paragraph that the partnership "is a *contract*," a *creation* of the *parties* thereto.

Because the contract of copartnership and the notice of dissolution thereof is required to be recorded in a public office, it does not follow that the *contract* is *created* or established by the State.

In the District of Columbia these same instruments and many others are required by statute to be recorded. They are not therefore "*creations*" of the State.

These Chilean partnerships have no true personality, because they have no "immortality" in the corporate sense, and because they are not created by the charter of the State. They are just as distinct from the true corporation as are partnerships in the United States, save that they can sue and be sued in their company name. That fact certainly does not give them citizenship. The Code of Chile does not confer nationality upon them. No authorities have been cited holding that merely because this power has been conferred upon any person or persons that they thereby become endowed with nationality or citizenship.

11. Juridic or juridical is defined as relating to jurisprudence or for dispensation of justice. (See Worcester, Webster, and Anderson's Dictionary of Law.) "To juristic persons, we can only attribute a *domicil*, but *no* proper *nationality* in the technical sense. Nationality postulates, as its basis, a series of rights and duties as to which a more careful investigation alone can show whether they belong to juristic persons. The grant of citizenship, therefore, has, in general, no meaning for juristic persons, and is mislead-

ing." (Bar's Int. Law, 2d Ed., 1892, 227, n. 1.) The Chilean Code has undertaken to define what is meant by juridical persons.

Article 545 reads: "A juridical person is a fictitious person, capable of exercising civil rights and to contract civil obligations, and to be represented judicially as well as extrajudicially. There are *two* kinds of juridical persons—*corporations* and foundations (endowments) of public charities."

It cannot be said that these juridical persons have nationality because they have civil rights and the right to contract civil obligations, and to sue and be sued. If so, let us see what follows. By Article 57 of the Chilean Civil Code, it is provided that "foreigners in respect to the acquisition and enjoyment of *civil rights*, which the code regulates, shall be treated no different than Chileans." A foreigner, then, by virtue of the law of Chile is capable of exercising civil rights and contracting civil obligations, and can sue and be sued in the courts of Chile. Is he, therefore, a Chilean within the meaning of this Convention?

Neither can it be said that because these "juridical persons" are fictitious persons that they have the right of citizenship, for under the civil law a succession, where there are only collateral heirs who have not accepted it, has all the rights and liabilities of the deceased, it can acquire new rights and incur new liabilities. It may incur obligations *ex delicto* as by the default of a slave. The civil law, therefore, recognizes it as a legal entity and a "juridical person." Does it, therefore, have the nationality of the country where it is being probated?

Neither can it be said that, although a copartnership has none of the attributes of nationality, that the Chilean Government can, by designating it as a "juridical person," thereby confer citizenship upon it? Mexico in its constitution has provided by Section 11, Article 30, Subdivision 3, that "foreigners who acquire real estate in the Republic, or have Mexican children, provided they do not manifest their resolution to preserve their nationality, shall be Mexicans."

This provision has frequently come before international arbitrators and it has always been held to be ineffectual for the purpose of preventing a nation from interposing in behalf of its own citizens living in Mexico.

12. As before stated, several cases have arisen before commissions and arbitrators where individual partners have been given awards for injury to partnership property, or where the question as to nationality of these societies has been presented and passed upon more or less directly. We have already referred to the case of Baron, Forbes & Co. In the case of L. S. Hargous *v.* Mexico, opinion by Thornton, Umpire, United States and Mexican Claims Commission, it appeared that the association was a commercial house formed in Mexico; that the umpire allowed the claim of one of the partners, who was an American, and denied the right to recover on the part of the other partner, who was a German. (See Moore Int. Arb., 2326, 2329.) A surviving partner of a Mexican company was given an award before the United States and Mexican Claims Commission. (Garrison, Survivor, *v.* Mexico, Lieber, Umpire, Moore, Int. Arb. 1356, n. 2.)

In a case before the United States and French Claims Commission, where the copartnership was a company in New Orleans (where the civil law is in force), the claimant lived in France. The claim arose during the American Civil War, and the claims of two partners living in Louisiana were each dismissed because they had given aid and comfort to the enemy, but the claimant in this case, the third partner, was allowed to recover for injury to the partnership property. (Rocheteau *v.* United States, Boutwell's Rep. 124.

In the case of Cerruti, referred to in the decision of the majority of the Commission, the claimant had been deprived of his individual property and his interest in a copartnership, organized in Colombia under a code similar to that of Chile. It was contended on the part of Colombia that no recovery

could be had before the arbitrator on account of the partnership property, because the company was a juridical person and a citizen of Colombia, and Cerruti's interests were not distinct and separate from that of the company itself. I have been unable to discover anything in the case that indicates that this contention on the part of Colombia was abandoned.

The important bearing of that case on the case presented here is the fact that Italy, a civil law country, made the claim in behalf of Cerruti, not only for his individual property, which was destroyed or confiscated by Colombia, but for damages to his interest in the copartnership of Cerruti & Co., and that Colombia, although a civil law country, had confiscated or destroyed the interest of Cerruti in Cerruti & Co., because it was claimed that he was not neutral in a war that had taken place in Colombia. Both countries thus recognizing the fact that a partner in a company has an interest in the copartnership property, separate and distinct from the copartnership itself. It is true, as before stated, that when the matter was presented to the arbitrator, Colombia by its brief assumed the contrary position, and endeavored to get the claim, so far as the injury to the property of Cerruti & Co. was concerned, rejected on the ground that Cerruti & Co. was a juridical entity, and therefore a citizen of Colombia.

If this had been correct, then the arbitrator, no matter what the terms of the Convention might be, unless the point were distinctly waived by the agreement for arbitration, could not award anything on account of the injury to Cerruti & Co., for it was a Colombian citizen and its property the property of a citizen of Colombia.

That the arbitrator was required to determine this question in the very outset is shown by the fact that in the first paragraph of the award the arbitrator, President Cleveland, announced that the claim of Cerruti for injuries to the firm of E. Cerruti & Co., was a proper claim for INTERNATIONAL ADJUDICATION. The arbitrator, therefore, proceeded to award a large sum to E. Cerruti for these losses, not only to his

individual property, but for the damages which he suffered to the property of E. Cerruti & Co., which constituted much the greater part of the award.

13. Several cases are cited by my learned colleagues, in which the courts in this country have held that a certain copartnership formed in Louisiana constituted a juridical entity, and that for the purpose of giving jurisdiction to the United States courts in cases arising between aliens and citizens, or citizens of the different States, these partnerships were to be considered citizens of Louisiana. A careful examination of these cases shows that they in no way uphold the contention that a partnership or limited partnership has nationality within the meaning of this Convention. If that be the doctrine of either of those cases it has been overruled.

The first case cited is Smith against McMicken, 3d La. An. Rep 319. That case merely holds that the interest of an individual partner, in a partnership, formed in Louisiana, cannot be levied on for his individual debts, until the creditors of the copartnership have first been satisfied. But that there is no conflict between the civil and the common law doctrine on that subject, the court, in that case, recognizes in the following langaage :

"And if we look to the common law writers, we find in the general theory a substantial harmony with our own, with the French, and with the civil law on this point."

That this quotation expresses the true doctrine of the common law on the point will be seen by an examination of the following authorities. 17th A. & E. Encl. Law, 1342, 1344, Sanborn v. Royce, 132 Mass. 595, 3d Kent Com. 65; Bank v. Carlton R R., 11th Wall. 624, Lindsay on Partnerships, p. 359. All else that was said in the case of Smith v. McMicken was mere dicta. It is apparent, then, that the point DECIDED has no bearing on the case at bar, but if it

had, that there is no conflict as to that point between the common and the civil law.

To the same point is cited Nav. Co. *v.* Agar & Co., 14th Fed. Rep. 615, the contention being that because the court there holds that Agar & Co., a Louisiana copartnership, composed in part of foreign citizens, could be sued as a citizen of that State in the Circuit Court of the United States, under the provisions of the United States statutes giving jurisdiction to that court, in a suit between citizens of a State and an alien (U. S. Rev. Stat. 629), that therefore such a company is a citizen within the meaning of this Convention.

Nothing could be farther from the opinion than such a deduction from the case. It does not follow at all that because Agar & Co. was held to be a citizen of Louisiana within the purview of the above statute, that such a partnership is a citizen of the United States, or that the case brings the claim of such a partnership within the jurisdiction of this Commission, regardless of the nationality of the members of such a company.

The statute is a mere municipal regulation to determine the jurisdiction of the United States Circuit Courts in certain cases.

Whether a person has or has not citizenship of a State within the meaning of this statute, can have no bearing on the question of the jurisdiction of this Commission over the same person. To illustrate, a person who resides in the District of Columbia or in a Territory of the United States, although a native-born citizen of the United States, is not a citizen of a State within the meaning of this statute. (Camden *v.* Hughes, 127 U. S. 325.) Would any one say that therefore such a person was *not* a citizen of the United States within the meaning of this Convention?

To illustrate the point farther, we may refer to the case of Railway Co. against Whitton, 13 Wall. 270, where it is held that a corporation is a citizen of the State creating it, within the meaning of the above statute. But it is also

pointed out in that case that it is *not* a *citizen* of such State within the meaning of several provisions of the United States Constitution.

It is not a citizen, for instance, within the meaning of Article IV, Section 2, of the Constitution of the United States, which provides, "that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States." (Paul *v.* Virginia, 8th Wall. 168, 179.)

The reason why the court holds that a corporation is a citizen of the State creating it, within the meaning of the provisions of the R. S. 629 is that "the numerous and ever changing associates in such an association, cannot be allowed to allege the different citizenship of one or more of these stockholders, in order to defeat a plaintiff's privilege of suing it as the citizen of a State creating it." (And *vice versa.*) (Marshall *v.* B. & O. R. R., 16 How. 328).

We do not think the doctrine in the case of Agar will be sustained by the Supreme Court, and it is certain that numerous later cases have been decided by that, and the Circuit Courts holding a contrary doctrine. In Adams Exp. Co. *v.* May *et al.*, 27 Fed. Rep. 907, it is held that such an association could not be sued in the United States Circuit Court. This is the same Adams Express Co. described in Hoey *v.* Coleman *ante*. In Chapman *v.* Barney, 129 U. S. 677, 682, it was held that a joint stock company is not a citizen within the meaning of the above statute. The same was held in reference to a limited copartnership, formed under the laws of Pennsylvania, where these companies have many of the attributes of a corporation. (Carnegie & Co. *v.* Hobart, 53 Fed. Rep. p. 10.)

Article 545, cited by my colleagues from Field's Proposed International Code, which is somewhat erroneously quoted, has no application here, as will be found by an examination of the principal case cited, by Judge Field, to support this article. The case is Bank of Augusta *v.* Earle, 13 Pet. 388.

All that is stated in that case is that the laws of a State are not enforcible outside of its jurisdiction.

Thereupon the Court holds that a corporation *may* sue, in the courts of *another* State, on the contracts of such corporation made outside of its own State.

In the case of the Compania Unida de Navegacion, also cited, Mr. Seward did *not* hold that an ephemeral "juridical" copartnership, composed of two, or even ten persons, which can be dissolved on the next day after its *contract* is filed by the death of a single partner and, for various other causes, was to be assimilated to a citizen of Colombia.

What he did hold was, that this company, organized in Colombia by the *decree* of the Government, having *perpetual succession*, with shares of stock scattered, no doubt, to a large extent in various countries, was to be assimilated to a citizen of Colombia.

It was a society "Anónima," and a true corporation.

It will be seen, therefore, that the cases cited by my colleagues have no bearing on the question here and give no light as to the meaning of the word citizen as qualifying the words "corporations" and "companies" under this Convention.

14. Let us consider the question, briefly, of the right of these claimants before this Commission in the light of the broad principles of the "public law, justice and equity." Let us consider whether in reality the injuries complained of in the memorial in this case were committed against the *property* of the claimants, and whether *they* were *injured* by the acts complained of.

Alsop & Company went into liquidation before December, 1876, and John Wheelwright was made its liquidator. Among the assets of the firm was a claim against Bolivia for a large sum of money, and in the latter month the liquidator, in his capacity of liquidator, and in that capacity only, made an agreement with Bolivia under which he was to receive payment of this claim against Bolivia, through reve-

nues collected at the Arica custom-house, in part, and in part from the proceeds of mines owned by Bolivia, and which it *granted* for that purpose, *to him*, for a limited number of years, as will appear by reading the agreement with Bolivia, on file in this case.

Therefore, when the war between Bolivia and Chile began, in 1879, this liquidator was in possession of a right to obtain payment of a claim, due to the old company, by means of certain custom-house receipts and the proceeds of certain mines. Claimants allege that Chile interfered with these rights of the liquidator, so that neither he nor his successors have been able to obtain payment of the claim, in accordance with the agreement with Bolivia.

The present claimants make their demands before this Commission, not upon the original claim or agreement with Bolivia, but for the injury caused by this wrongful interference. Claimants are citizens of the United States, but it is asserted that the acts of Chile, which are complained of, were not committed against *their* property.

These claimants are the persons who have the beneficial right to the *damage* which it is sought to recover. It would not be the "property" of the liquidator; he would be a mere *trustee*, for the real owner, and would have no *interest* in these damages, unless he be an ex-partner.

It is admitted that Mr. Chauncey would be ultimately liable in person for the debts of the old firm, and ultimately an owner of its assets. He is the party actually interested and the party whose "property" is at stake, and any award in this case would go to him as a matter of fact, even if it had to go to him through a process of bookkeeping in which the "liquidator" appeared as the channel. Mr. Chauncey's interests, then, have been injured by the acts of Chile since the firm went into liquidation, and his "property" has been injured, and it is common sense and an equitable conclusion that he is the person entitled to recover within the meaning of this Convention.

16. To decide that a limited partnership formed in Chile is a citizen of Chile, but that an association of precisely the same kind (except that it cannot sue and be sued in its company name), formed in the United States, is not a citizen of the United States, is to adopt one rule for Chile and another for the United States, which certainly is not according to "the public law, justice and equity."

It is a principle of international law that it is the duty of a nation to protect its citizens in a foreign country from injury by illegal acts of such country. In dealing with international questions arising under this conceded right, it is absolutely necessary, then, that whatever may be the local law, the word "citizen," as applied to corporations, companies, or any other association, must have the same meaning everywhere.

The right of one government to intercede with another, on account of injury to any person by the acts of the latter, is confined to the cases of persons who have the nationality of the intervening government. It cannot intervene in behalf of any one not having its distinct nationality. It is not sufficient for the corporation, company, or association to be domiciled in the country, nor that, for some municipal or local reason, it is treated as a citizen, but it must have nationality within a uniform rule that can be applied internationally.

The circumstances or characteristics which confer citizenship or nationality upon it in one country, must according to international law, confer citizenship upon it in all other countries which recognize that law. Otherwise, there could be no common rule of action in the treatment of these associations internationally. Those having the characteristics and attributes of corporations, if they have nationality in one country must, under international law, have nationality in all countries. Those associations having the characteristics and attributes of partnerships, if they have nationality in one country must, under international law, have

nationality in all countries. Or, to state it differently, the same characteristics and attributes which confer nationality upon a corporation or association, organized in one country, must confer nationality upon a corporation or association organized in any other country.

We have sought to point out (paragraph 5) for what reasons these corporations and companies do have nationality within the purview of the "public law." If such a uniform rule be not adopted, then France, for instance, would have the right to protect a company formed in its territory and on which it had conferred "juridical rights," and the United States or Great Britain, could not protect such a company having precisely the same characteristics and attributes under its law, but upon which it had not conferred "juridical rights."

To illustrate what would be the result of such a rule, let us suppose a convention, between the United States and France, identical with the one under which this Commission was organized. And suppose two claims to be presented to that Commission, one on behalf of the Government of France, and one on behalf of the Government of the United States, for substantially the same amount, and arising from similar injuries committed by the respective Governments. The claim presented against the United States is one in behalf of a limited partnership organized and domiciled in France and composed of three persons, one a citizen of France, one of Great Britain, and one of the United States. The partnership is termed a "juridical person" by the Code of France, and hence the Commission holds that it has the nationality of France, and makes an award in favor of all these people Americans, British, and French. On the other hand, the claim presented on behalf of the United States is a claim for injury to the property of a partnership, formed under the laws of the United States, and domiciled there, and composed just as the other was.

The law under which it was formed is taken from the

French code, and is identical with it, except that it does not provide that the partnership shall be a "juridical person." The Commission, therefore, holds that the copartnership has no nationality in the United States; that the American has a right to recover on account of injury to his interest, and refuse relief to the others, because they are not citizens of the United States. If the same cases came before the State Departments of the respective Governments, no such rule would be adopted. Each would make claim, and could only make claim touching the interest of its own citizens in each copartnership.

Let us take another illustration. Suppose Alsop & Co., instead of being injured by Chile, had been injured by acts committed by the United States; could Chile, on behalf of Alsop & Co., composed entirely of American citizens, as it was, present any claim to the State Department of the United States or before this Commission on that account? We are confident it could not.

I.

In conclusion we say:

(*a*) That only such corporations and companies as are created by charter, patent, or decree of the sovereign power of the country have nationality, and hence the citizenship of that country.

(*b*) That a business corporation or company to be endowed with the nationality of a country must also have "perpetual succession."

(*c*) Alsop & Co. was not created by charter, or by decree of the President of Chile. It did not have "immortality," in the corporate sense. It was not, therefore, a citizen of Chile.

II.

The equitable, beneficial interest in the property injured in this case by the acts of Chile, was at the time of the injury

and still is in the claimants. The motion to dismiss should be overruled.

WM. G. GAGE,
Commissioner for United States.

Attest:

JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

Delivered February 8, 1901.

United States and Chilean Claims Commission.

DECISION No. 5.

HENRY CHAUNCEY ET AL. *v.* THE REPUBLIC OF CHILE.	*No.* 26.

Decision of the Commission Dismissing Case.

The Commission consider that this case is governed by the decision of the case of Henry Chauncey *v.* The Republic of Chile, No. 3, and the claim is therefore dismissed for want of jurisdiction, but without prejudice.

J. B. PIODA,
Commissioner for Switzerland.
WM. G. GAGE,
Commissioner for the United States.
C. MORLA VICUNA,
Commissioner for Chile.

Attest:
JOHN F. BALL,
ENRIQUE BALMACEDA,
Secretaries.

Delivered February 23, 1901.

United States and Chilean Claims Commission.

DECISION No. 6.

GRANT WALKER, ADMINISTRATOR, ETC., AND OTHERS, *Claimants*, *v.* THE REPUBLIC OF CHILE.	*No.* 31.

Decision of the Majority of the Commission Dismissing the Claim.

In the matter of the ship *Sportsman* two claims were filed, the former by the charterers and the latter by the owners of said vessel.

As the facts upon which the alleged liability of Chile is based are substantially the same in both cases, differing only as to the claimants and as to the nature and amount of damages sustained, the two cases, with the consent of the Commission, were presented together. During the argument, however, the Honorable Agent for the United States stated that he assumed that Case No. 26 would be governed by the decision heretofore rendered in Case No. 3. As the claimants in Case No. 26 are the surviving partners of the

still existing Chilean society en comandita in liquidation of Alsop & Company, said case was therefore dismissed for want of jurisdiction, and Case No. 31 is now considered alone.

The facts of this case are as follows:

In July, 1857, the ship *Sportsman*, then owned by Walker & Brother and Pierce & Company, whose representatives are the claimants in Case No. 31, and commanded by William Thompson, was chartered by the firm of Alsop & Company, of Valparaiso, whose representatives are the claimants in Case No. 26. The ship was an American vessel of about 600 tons, duly registered at the port of New York, and all her owners and her commander were American citizens.

By the terms of the charter party she was to be loaded with a cargo of provisions for Cobija, Mejillones, Gualaguala, Gatico and Tames, in the Republic of Bolivia, and other places; she was to dispose of her cargo of provisions in said ports and then to load with copper ore, etc., to be carried to the United States.

The ship cleared from Valparaiso and went to Cobija, a port of entry of Bolivia, where she obtained a license in due form from the Government of Bolivia to touch and trade at the ports above mentioned, as well as at the port of Santa Maria (although said port of Santa Maria was not named in her charter party) and also took on board a Bolivian custom-house officer, some of the ports named in her charter party not being open ports, and there being no custom house or revenue officers located there. The ship then proceeded to Gatico and took on board part of her cargo, but not being able to obtain a sufficient amount of ore, and learning that a cargo could be had at Santa Maria, a port situated in 23° 27′ south latitude, she set sail for that port, where she arrived and came to anchor in the bay known as Constitution bay or bay of Santa Maria, on the 19th of August, 1857. She began at once to take on board a part of her cargo of copper ore. The following day, after she had taken on board a

small portion of such cargo (about 25 quintals), the steam corvette *Esmeralda*, belonging to the Chilean navy, entered the harbor. It seems that during the summer of 1857 the custom-house of Caldera, in the Republic of Chile, had received notice that along the coast of the desert of Atacama (which extends from 23° to 26° south latitude), considerable secret trade was going on at the closed ports, and the Intendente had petitioned the Government of Chile for a force to watch that portion of the coast of the Republic. The Government placed at the disposition of the Intendente the corvette *Esmeralda*, and he ordered her to sail along the coast of Atacama. On the morning of August 20, 1857, this vessel anchored in the bay of Santa Maria or Constitution bay, situated about thirty miles south of the port of Mejillones. There the *Sportsman* was found, and upon inquiry, her captain declared to the commander of the *Esmeralda* that he was loading metal without a permit from the Chilean authorities, but with a Bolivian permit from the authorities of the Bolivian port of Cobija. When this explanation was heard and the facts proved, the commander of the *Esmeralda* informed the captain of the *Sportsman* that the bay of Santa Maria was Chilean territory, and that it was not lawful, without a permit from the Chilean authorities, to trade in that port; that the infraction of this regulation might subject his vessel and cargo to grave responsibility unless he could give satisfactory answer or excuse to the Chilean authorities; and that in order to present this justification it was necessary for the *Sportsman* to go to Caldera, the nearest port where the authorities who could pass upon his conduct resided. Captain Thompson of the *Sportsman* refused to comply and offered to discharge the ore loaded at Santa Maria and to leave the port. Commander Goni of the *Esmeralda* stated that he was unable to consent to this course as he had no authority to determine the case, which, according to Chilean law, must be adjudged by the Governor of Caldera. Thereupon, he again requested

Captain Thompson to set sail of his own accord to Caldera. This, Captain Thompson positively refused to do, whereupon the *Esmeralda* proceeded to Caldera with the *Sportsman* in tow. Progress in this manner was slow, and the voyage to Caldera lasted four days, the two vessels arriving there on August 28, 1857.

Upon their arrival, Commander Goni immediately reported all the particulars of the case to the Governor of Caldera, who at once transmitted the facts to the Intendente of the Province. The Intendente made an examination, the result of which was that it appeared that although the captain had committed an apparent infraction of the law, still he had had no intention or purpose of violating said law, and thereupon the Intendente wrote the Governor as follows:

"Inform the captain of the United States ship *Sportsman*, of Boston, that he may leave with his vessel, but under the admonition that he cannot take a cargo nor even approach Chilean ports or inlets which are not inhabited, without the express permission of the authorities of this country. As Chilean territory is to be considered all territory along our coasts to the Bay of Mejillones, inclusive.

"God preserve your Excellency.

"J. V. DE MIRA."

The Governor on the same day, August 29, transmitted the above letter to Captain Thompson, and added:

"I communicate the same to you for your information, advising you that the proper orders have been given to the commander of the corvette *Esmeralda* to place the vessel under your command at full liberty.

"(Signed) F. M. ARIS.

"To the Captain of the U. S. S. *Sportsman*."

On the same day, Commander Goni also sent Captain Thompson a copy of the Intendente's letter, and added:

"And I transcribe the same to you for your information, advising you at the same time that I have this date ordered

the officers and other members of the crew of the corvette *Esmeralda* to leave the vessel which is under your command.

"God preserve you.

"(Signed) JOSE A. GONI.

"To the Captain of the U. S. S. *Sportsman*, of Boston."

Upon receipt of the order from Commander Goni, the Chilean officer in charge of the *Sportsman*, on the same day, August 29, withdrew, turned over the *Sportsman* to Captain Thompson, and informed the latter that he could leave the port at his convenience.

It is plain, therefore, that only five days elapsed from the time that the *Sportsman* was taken in tow by the *Esmeralda*, in the bay of Santa Maria, to the time the order for her release was transmitted to Commander Goni, and by the latter to Captain Thompson.

Although his ship was now released and he was at full liberty to leave Caldera, Captain Thompson refused to reassume command of the *Sportsman*. He filed a formal protest with the United States Consul at Caldera against the seizure of his ship and the circumstances connected therewith. This protest was sent by the Consul to the United States Minister at Santiago. The Minister presented the protest to the Chilean Government, which replied with an emphatic and energetic note, fully sustaining the action taken by the commander of the *Esmeralda* and the authorities at Caldera, and denying any responsibility for alleged damages to the *Sportsman*.

During this time Captain Thompson remained at Caldera, still refusing to reassume the command of his ship. Finally, however, about December 3, 1857, without any further action whatever on the part of the Chilean authorities, Captain Thompson made up his mind to leave, took command of the *Sportsman* and sailed away.

For the arrest and detention of the *Sportsman*, the memorialists claim damages in the sum of $35,593.75, with interest thereon at 6% from December 7, 1857.

The grounds upon which the memoralists base their claim for damages are as follows:

1. That the seizure of the *Sportsman* and the other acts complained of did not take place within the jurisdiction of Chile.

2. That even if the seizure had taken place within the jurisdiction of Chile, such seizure was without lawful warrant or subsequent justification by the Chilean authorities.

I.

The first point to be considered, then, is whether the port and harbor of Santa Maria, where the seizure was made, were within the territorial or maritime limits or under the dominion of the Republic of Chile at the time of the seizure.

It is undisputed that the harbor of Santa Maria is situated on the coast of South America in about 23° 27′ south latitude.

The exact boundary between Chile and Bolivia seems to have been a matter of dispute from time immemorial. It is asserted by Chile that from the period of its colonization, 350 years ago, the northern limit of Chile was the 23d parallel of south latitude. On the other hand, it is asserted with equal confidence by Bolivia that from the earliest times the southern limit of Bolivia extended to the river Salido, in about latitude 26° south. The territory extending between the 23° and the 26° is known as the Desert of Atacama.

When they became independent nations the South American Republics proclaimed the principle that their limits should be the same as when they were colonies, a principle known to the public law of that continent by the formula of the uti possidetis of 1810.

It seems that Chile, under the uti possidetis of 1810 claimed, as belonging to the presidency and captaincy-gen-

eral of Chile, when it became independent of Spain, sovereignty over the territory to the south of parallel 23, from the border of the Pacific to the divortia aquarum in the cordillera of the Andes.

Bolivia, relying upon the same principle, claimed as belonging first to the Audiencia of Charcas, and after to the province of Potosi, the same territory as far south as the port of Paposo, on parallel 25.

Both Republics declared their titles to be good, and finally agreed in treaties made in 1866 and 1874 to divide the contested territory between them, adopting as their boundary line parallel 24, from the Pacific to the divortia aquarum of the cordillera of the Andes, on condition, however, that Bolivia should not increase the existing export duty on minerals nor impose any new taxes on citizens of Chile within the 23d and 24th parallels.

In 1878 Bolivia enacted a law imposing a new export duty on nitrates produced in said territory, and refused Chile's request to repeal said law. Thereupon, in 1879, Chile declared that the treaties ceased to be binding and that the sovereign rights of Chile over the territory within the 23d and 24th parallels were from that date revived or revendicated. Chilean troops were at once sent to said territory, the Bolivian forces were defeated, and the reasserted sovereign dominion of Chile over the territory to the south of 23° became complete.

Such, very briefly, have been the claims of the two Republics to the disputed territory lying between 23° and 26° within which lies the harbor of Santa Maria.

It is not in the province of this Commission to settle a boundary question which has agitated two countries for hundreds of years. *The question to be determined is whether the possession of this territory by Chile, in the year* 1857, *was sufficient, according to international law, to legalize, as far as foreign nations are concerned, the exercise of its control and jurisdiction.*

The claim of Chile to all the territory as far north as the 23d parallel is substantiated by scores of maps, histories, chronicles, books of travel, records of scientific expeditions, and various documents too numerous to mention, from the middle of the 16th century downward. A large number of these are introduced in evidence. The claim may, however, be subordinated to the question of *effective occupation of the territory in question by Chile in the year* 1857.

As already stated, the territory lying between the 23d and 26th parallels is known as the Desert of Atacama, which for hundreds of years had been a dreary waste, incapable of cultivation, sparsely settled by a few miserable natives, and of no practical value to either Chile or Bolivia. It is for these reasons that for so many centuries the sovereignty of both countries over these rocks and sands remained in a state of *claim*, without effective occupation by either.

It was not until about 1840 that a change came. About that time the Chilean Government began to make explorations in the littoral of the desert as well as in the desert itself, and ascertained that large deposits of guano existed along the shores, and that valuable beds of ore, nitrates, etc., existed in the desert. In July, 1842, the President of Chile addressed to Congress a message on the subject of guano. In this message he said:

"I judged it advisable to send a commission to explore and examine the coast comprised between the port of Coquimbo and the Morro de Mejillones, for the purpose of discovering if any deposits existed *in the territory of the Republic*."

This message served as the introduction to a law in which the deposits of guano already discovered along the shores of Atacama were declared national property. This law was promulgated as a law of the Republic of Chile on October 31, 1842.

The following is an extract from this law:

"Whereas the National Congress has approved the following law:

"Article 1. The guano deposits existing on the coasts of the Province of Coquimbo, in the littoral of the Atacama Desert, and in the adjacent islands and inlets, are hereby declared to be the property of the nation.

"Article 2. Any vessel, either national or foreign, that shall extract guano from any of the places lying within the foregoing demarcation, without permit from the Government of Chile, will be liable to seizure with all the cargo found on board.

"Article 4. He (the President) is also hereby authorized to invest, in case of necessity, a sum that shall not exceed six thousand pesos, *for the establishment of a maritime revenue service*, to prevent the clandestine extraction of guano."

The custom-house of Valparaiso alone, in the execution of this law of October 31, 1842, in the period elapsing between that date and the year 1857, issued 113 licenses to various ships of different nationalities to load guano in Mejillones (situated on the 23° south latitude), Antofogasta, Santa Maria and other inlets along the coast of the desert.

Other Chilean custom-houses also issued a large number of licenses during the same period for the same purpose.

In 1847 the Chilean warship *Chile* was ordered to make an extensive survey along the coast of Atacama, and a detailed report was made by her commander to his Government. In the letter in which he transmits this report he says, among other things:

"I sailed next day taking with me some of the miners and their implements, and cast anchor on the 8th in the port of Mejillones. I left a garrison in a small enceint I had built with stones, measuring 27½ yards in length and 8½ in width, 3 feet thick and five feet high the walls, with two carpas in the interior and surrounded by a small ditch. I expect to return soon to that port, where I shall wait until the 1st or 2d of January."

A table of subdelegates appointed in 1852, shows that one Jose Zuleta, represented the subdelegation of Paposo, which, as the table shows, included the point of Mejillones. Part of this table reads as follows :

No.	Subdelegations.	Boundaries.	Subdelegates.	Districts.
17	Paposo.	N. *Mejillones point.* S. El Obispo. E. and W. the extension of the valley.	Jose M. Zuleta.	2

Mejillones point is situated on the 23° of south latitude.

In 1853 a comprehensive survey of the desert, including the coast as far as Mejillones, was ordered by the Government of Chile, and entrusted to a commission headed by Don Phillippi. This commission surveyed this coast in the Chilean warship *Janequeo*, and afterward made an extensive exploration of the desert itself. The result was an exhaustive scientific work, with a full report upon the resources of the desert—a work which remains the leading authority to this day.

The result of these various Chilean explorations and surveys was the discovery of large deposits of ore of various kinds, and in 1854 1857 a considerable number of concessions of copper mines in Mejillones and other places in the desert were granted by the Chilean Government.

In the year 1855 a maritime inspector was appointed by Chile for the coast of Atacama.

The administrative organization seems to have been as alert as possible to prevent exportations from the desert without the licenses required under the Chilean law.

As an instance of the exercise of jurisdiction by Chile over this territory may be cited an official communication

of the Intendente of Atacama. In March, 1857, official communication was received by him that the firm of Artola & Ossa were mining in the desert without a Chilean license. Part of this communication is as follows:

"No. 786. COPIAPO, *May* 8, 1857.

"In order to check such abuse you are directed to inform them, 1st. Inasmuch as the territory where they are operating the mines lies within the boundaries of this Republic, they must recognize the Chilean authorities, and renew their applications for a grant of said mines before the proper Chilean authorities, who will make the award. 2d. Should they fail to comply with this within fifteen days following that in which they have been warned, they will be expelled from the place they now occupy, and any other person may denounce and operate said mines. With this object in view, *you are to direct the subdelegate under whose jurisdiction that section lies*, to appoint an inspector to hear and decide all questions that may arise, in accordance with the regulations governing such public officials. In case that there be no facilities to inform the above-mentioned firm of the foregoing instructions, you will charter a vessel for that purpose, and report on the expenses incurred thereby.

"Yours, etc.,

"J. V. DE MIRA."

On August 3, 1857, a communication from the Intendente of Atacama to the administrator of customs of Caldera reported that in the inlet of Morro Moreno there was an English vessel loading mineral without a permit from the Chilean authorities. The Intendente requested the dispatch of a ship to arrest the English vessel.

Upon receipt of the above information the *Esmeralda* was at once dispatched by the Government of Chile to arrest this English ship (which was done) and to patrol the coast of Atacama for the purpose of preventing such frauds. It was during this cruise that the *Esmeralda* discovered the *Sportsman*, on August 20, 1857, loading ore in the bay of Santa Maria without a Chilean license.

The above facts and documents (which are but a few of the many in evidence) are set out, as briefly as possible, in order to demonstrate the effective occupation and exercise of jurisdiction by Chile over the territory in question, which includes the port of Santa Maria.

Although, as stated above, it appears that both Chile and Bolivia claimed from time immemorial the territory lying between 23° and 26°, nevertheless, in the year 1857 and for many years preceding, Chile, whether rightly or wrongly, had possession and effective occupation, *corpore et animo*, of the disputed territory. It seems that Chilean energy and Chilean capital had explored and developed the desert which for so many centuries had been a waste. She had established an administration thereover, had created a maritime service for the coast and subdelegates for the interior, had prevented the exportation of guano and metals without Chilean licenses, and had completed her possession by numerous acts manifesting the *animus domini*.

Although Bolivia, in 1857, was still vigorously asserting her claim to the disputed territory, and had previously issued a number of guano and mining licenses thereon, yet it does not appear that, beyond this, she had made her occupation effective. She had sent no ships to patrol the coast and had created no administration in the interior; her possession was *animo* rather than *corpore*.

Without attempting to touch upon the moral rights of Chile to this disputed territory, it seems clear that the acts of domination cited above on the part of Chile are amply sufficient, according to international law, to legalize, as far as foreign nations are concerned, the exercise of its control and jurisdiction.

The principles that govern such a case are definitely laid down by the best writers on international law:

"Il faut que la prise de possession soit effective, c'est à dire accompagnée ou suivie d'un commencement d'organiza-

tion administrative ou d'exploitation commerciale ou industrielle dans le pays."

Calvo on International Law, Sec. 266.

Speaking of the *animus domini*, Rivier says:

"Cette volonté peut se manifester par la mise en œuvre des ressources du territoire occupé, par l'exploitation agricole, industrielle, du territoire, par tout ce qu'on peut appeler un travail d'appropriation, si du moins ce travail implique la volonté de l'État, et non la seule volonté de particuliers. Mais elle se manifestera surtout et nécessairement par l'établissement d'une administration publique, d'un government: c'est la ce qui montre veritablement l'intention de souveraineté. C'est seulement si ces conditions sont remplies que l'occupation est effective, et l'occupation effective est seule reconnue par le droit des gens actuel."

Rivier, Droit Des Gens, Vol. 1, p. 192.

When there is a contest or doubt concerning the sovereignty of territory, the rule relating to third powers is stated as follows.

"S'il y a doute et discussions sur la souveraineté, c'est ordinairement l'état de possession qui règle la conduite des tiers Etats."

Kluber, Sec. 25.

"L'obligation de dédommagement disparait, lorsque les personnes lesées sont elles-mêmes causes de l'événement qui a entrainé le dommage. Il n'existe pas, notamment, d'obligation d'indemniser ceux qui se rendent dans un pays ou veulent s'y livrer au commerce et à l'industrie, alors qu'ils savent ou ont du savoir que des troubles y ont eclaté."

Institut de Droit International, Decision in Congress of Neuchâtel, September, 1900.

As already stated, the possession of Chile in 1857 to the territory wherein lay the bay of Santa Maria had been affirmed by numerous acts of sovereignty civil, commercial, administrative and military. Her occupation was effective,

and under such circumstances third powers could have held Chile responsible for injuries resulting to their citizens. Consequently, citizens of third powers cannot be heard to object to the exercise of Chile's reasonable and legal regulations in force in such territory.

Although it is hardly material to the discussion of this case, it may be added that Alsop & Company, the charterers of the *Sportsman*, were fully aware that the bay of Santa Maria was in Chilean territory. The depositions of Edmundo Eastman, agent of the firm in Santiago, and of H. H. Munro, head of the house of Alsop & Company in Valparaiso, are in evidence. They testify that in June, 1857, Mr. Munro directed Mr. Eastman to ascertain from the chief official of the Ministry of Marine of Chile whether the port of Santa Maria was within Chilean territory, and that Mr. Eastman learned from said official that this port was comprised within Chilean territory; that to dispatch a ship to this port it was necessary to send on board a guard of the Valparaiso custom-house. Mr. Eastman informed Mr. Munro of these facts by letter on June 7, 1857.

Furthermore, in a letter dated Valparaiso, October 13, 1857, from Alsop & Company to the United States Minister at Santiago, the following statement appears:

"We beg further to advise you that when we chartered the ship *Sportsman* we did not intend her to go to the port of Santa Maria, and consequently, did not mention that port to Captain Thompson nor insert it in the charter party. Captain Thompson went into that port in deviation of his charter party and in his own responsibility, for which he received a pecuniary compensation which we never intended to or gave sanction. Under all these circumstances we have entered our solemn protest before the U. S. Consulate at this port, against the ship *Sportsman*, her officers, crew, and owners for the deviation of the charter party by which the ship was bound to go on a certain voyage and no other."

Comment upon these documents is unnecessary.

II.

The second ground upon which the memorialists base their claim for damages is that even if the seizure of the *Sportsman* took place within the jurisdiction of Chile, such seizure was without lawful warrant or subsequent justification by the Chilean authorities.

By the law of August 23, 1851, Chile enacted certain custom regulations. Articles 17 and 18 of such regulations are as follows:

"Article 17. The guano on the north coasts of the Republic on the shore of the Desert of Atacama and on the adjacent islands and islets, may be taken by any vessel according to the prescribed regulations after receiving the license mentioned in the following article:

"Article 18. Licenses for vessels that go to load at the guano fields, *and to transact commerce of any kind in the ports or islets not open*, shall be granted by the Governors of the Provinces of the largest port of entry from which the vessel comes, after receiving the report of the chief of customs."

In Article 1, the penalty is fixed for the violation of these regulations. This article says:

"Article 1. Shall be confiscated: 1. Any vessel, including its profits and equipments, which anchors, *loads or lands merchandise* in any port on the coast of the Republic where such acts are forbidden."

Unquestionably, if Chile had jurisdiction over the territory in question, it could declare what ports should be open to trade and what should be closed, or regulate its commerce in any legal way that it saw fit. Within the limits of its sovereignty, jurisdiction was absolute and excluded that of every other State.

This principle of law is so well settled that it seems hardly necessary to cite the authorities.

"Foreigners entering this reserved territory must submit to the law of the sovereign in all that concerns their relations with the land and its inhabitants, as though they were on the land." Baker's Lawrence 1, 158.

"La mer littorale faisant partie du territoire, l'État y exerce généralement tous les droits découlant de la souveraineté. Ainsi le droit exclusif de navigation cotière ou cabotage, * * * l'administration de la justice et le droit exclusif de legislation, * * * l'administration des douanes et péages * * * le droit d'enquérir et d'aviser touchant les Navires qui entrent dans la mer littorale." * * *

Rivier. Principes du Droit des Gens. Tome 1, p. 148.

"When merchant vessels enter for the purposes of trade it would be obviously inconvenient and dangerous to society and would subject the laws to continual infraction, and the Government to degredation if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it."

Schooner *Exchange* v. McFaddon, 7 Cranch (U. S.), p. 487.

See also 1 Wharton's Digest, p. 134.

Calvo International Law, Vol. I, sec. 368; Vol. III, sec. 1305.

Case of Jally, Court of Cassation of France (1859).

When, on August 20, 1857, the *Esmeralda* apprehended the *Sportsman* in the port of Santa Maria, the latter ship was confessedly transacting commerce in a port of Chile not open to trade without having obtained a license, as required by the regulations enacted by Chile. Captain Thompson admitted that he had already put on board part of his cargo, about 25 quintals of ore, and, as the brief of the claimants states, "he at once desisted from taking on cargo and prompt-

ly offered to put ashore again the portion of cargo which he had already taken on board at that point."

Under these circumstances, as the *Sportsman* was loading merchandise in a port where such an act was forbidden, the ship was, under the Chilean law, liable to confiscation.

It was neither the duty nor the province of Commander Goni, however, to pass upon this question; nor was it in his power to grant the request of Captain Thompson that he be allowed to unload the ore taken on board at Santa Maria and leave the port. The *Sportsman* has been taken *flagrante delicto* in the violation of Chilean custom laws, and although Captain Thompson asserted that he had believed Santa Maria to be a Bolivian port, it was obviously the duty of Commander Goni to take the *Sportsman* before the proper official who could pass upon the case. This official was the Governor of Caldera the nearest open port. Commander Goni told Captain Thompson to set sail for Caldera by himself, but the latter refusing, the *Esmeralda* was necessarily forced to take the *Sportsman* in tow to that port. There the facts were at once laid before the Governor. The Governor referred the matter to his chief, the Intendente of Atacama, who, as head of the Province, had full authority to decide whether or not the case should be submitted to the tribunals. Within twenty-four hours of the arrival of the two ships at Caldera the Intendente had rendered his decision. It was to the effect that although the *Sportsman* had confessedly violated the Chilean laws by taking on board ore from Santa Maria, nevertheless, as the Captain asserted that in good faith he had believed said port to be a port of Bolivia, and as it appeared that he had not violated the law with intent, "no habia abrado con malicia," he was allowed to leave with his vessel, but under the express admonition not to take a cargo or even approach the closed Chilean ports without the express permission of the Chilean authorities.

If the Intendente had been aware that Alsop & Company

had been officially informed two months previously that Santa Maria was a Chilean port, and if he had known that Captain Thompson had gone to Santa Maria "in deviation of his charter party and in his own responsibility," it is possible that the fate of the *Sportsman* might have been different. It may be added that Captain Thompson claimed that he had permission from one of the agents of Alsop & Company to deviate from his charter party and go to Santa Maria, but this can hardly be reconciled with the protest of Alsop & Company to the contrary, dated October 13, 1857, cited above.

It was claimed by counsel for the memorialists in his brief, and by the Honorable Agent for the United States in argument, that even if Santa Maria had been within the territory and jurisdiction of Chile, and subject to her custom regulations, Chile would still be liable under the law of nations for the seizure and detention of the *Sportsman* for the reason that they were without due process of law; in other words, that it was absolutely necessary that the matter should have been submitted to the adjudication of a court in order that the Chilean authorities should be justified in the seizure.

It is difficult to see, under the circumstances of this case, after the captain's admission and the Intendente's decision, what question there was to submit to a court. The law was plain that vessels (both domestic and foreign) were forbidden "*to transact commerce of any kind* in the ports or inlets not open," without a license. The penalty was plain that any vessel should be confiscated which "loads or lands merchandise in any port on the coast of the Republic where such acts are forbidden." Santa Maria was a port not open. The *Sportsman* had been apprehended in a port not open, transacting commerce, loading merchandise, without the required license. Captain Thompson had admitted these facts, he had admitted that he had taken on board twenty-five quintals of ore at Santa Maria, and he had offered to unload them. These facts were not denied by him; they are not denied even to-day. His only contention was as to the

jurisdiction of Chile over the port of Santa Maria. There is no question here of "prize of war," of "probable cause," of "suspected violation"; it was a case, in time of peace, of an admitted infraction of a customs law, palliated only by the fact that the act appeared to have been committed in good faith in the belief that Santa Maria was in Bolivian territory. It was for this latter reason that the Intendente decided to remit the penalty and allow the *Sportsman* to go free, with an admonition.

The Intendente was the proper officer to decide whether the case should be submitted to the courts. He had the same discretion as is given to district attorneys in the United States, who are required to begin prosecution without delay "unless upon inquiry and examination they shall decide * * * that the ends of public justice do not require that a suit or prosecution should be instituted."

U. S. Navigation Laws, p. 156 (1899).

The case of Borden *v.* The Republic of Chile, decided by the former Commission (Agent's Report, p. 67) was cited by the Honorable Agent of the United States as conclusive in support of his contention here. The record of that case shows—

"That the district attorney of Chile gave as his opinion to the Court that it had no jurisdiction of the crime charged against Borden, and that there was no crime against Chilean law committed by him."

Such a state of facts differs fundamentally from that under consideration.

Most of the cases cited by the attorney for the claimants in his brief are cases of prize captures on the high seas in time of war, or of seizures made by ships of one country of vessels belonging to another in the waters of a third. None of those cited were cases of infraction in time of peace of custom regulations where the captain of the ship seized had confessed to the violation of law.

The case of the *Sportsman* is essentially different from any of the cases cited in the briefs of counsel for the memorialists or in argument by the Honorable Agent for the United States.

From the above considerations it results, then—

That at the time of the seizure of the *Sportsman* in the port of Santa Maria, the effective occupation and possession of this port by Chile was sufficient, according to international law, to legalize, as far as foreign nations were concerned, the exercise of its control and jurisdiction.

That the seizure of the *Sportsman*, having been made for a violation of duly enacted Chilean custom laws, was lawful on the part of the authorities of Chile.

That said violation, occurring in time of peace, having been confessed by the captain of the *Sportsman*, it was in the power and discretion of the Chilean authorities to remit the penalty and set the *Sportsman* free without submitting the cause to the adjudication of the courts.

The case must, therefore, be dismissed.

J. B. PIODA,
The Commissioner for Switzerland.

C. MORLA VICUÑA,
The Commissioner for Chile.

Dissenting Opinion of Mr. Commissioner Gage.

I cannot concur in the conclusion reached in this case by my honorable colleagues, and dissent therefrom for the reasons stated below.

The claimants are the representatives of American citizens, who owned the ship *Sportsman* of Boston, Massachusetts, Thompson, master, at the time the injuries occurred for which a recovery is sought. In July, 1857, the ship was charted to and loaded a cargo of provisions in Chile for Cobija, Mejillones, Gualaguala, Gatico, and Tames, in Bolivia, and places in Peru, where she was to load nitrate of soda and copper ore for United States ports. After disposing of the provisions she obtained at Cobija, a license from Bolivia to take on ores at the port of Santa Maria and other ports at which there were no port officers, and she therefore took on a revenue officer of Bolivia.

On the 20th of August, 1857, the *Sportsman* was at the port of Santa Maria, on the west coast of the Desert of Atacama, in about 23° 27′ south latitude, loading copper ore and having this officer on board. On that day the Chilean warship *Esmeralda*, came into the harbor and ordered the captain of the *Sportsman* not to take on further cargo without a license from Chile, and directed her to proceed to Caldera and report to the Chilean officials at that place. The captain offered to unload the ore he had in, and to depart for other ports of his charter, but refused to go to Caldera.

Thereupon, and about the 24th of August, the *Esmeralda* took possession of the *Sportsman*, placed a crew in her and an officer in command and proceeded with her to Caldera. There, after a detention until the last of the month, the captain was informed by the Chilean authorities that he might proceed on his voyage, but not to enter any unopen Chilean port without a license from Chile, it being stated

that the territory to the bay of Mejillones inclusive was considered Chilean.

The captain of the *Sportsman* prior to that time had filed a protest with the United States Minister in Chile, and when notified that he might proceed on his voyage he declined to reassume command of his ship until ordered so to do by said Minister. The ship remained at Caldera therefore until the following December, when, upon application to the United States Minister, the captain was informed that nothing further could be done at that time to adjust the matter in dispute, and he thereupon reassumed command of his ship.

No charge was preferred against the *Sportsman* or her master in any court, and she was not libeled for violation of the Chilean revenue law.

By the seizure of the ship *Sportsman* the captain of the *Esmeralda* became *prima facie* a trespasser, and the Government of Chile became responsible for any loss or damage occasioned thereby unless she can justify the seizure. To justify it respondent must show either title to the territory where the *Sportsman* was seized; undisputed possession thereof for a considerable length of time; or exclusive temporary possession.

Respondent claims that the port of Santa Maria being south of 23° south latitude was Chilean territory, and therefore that the captain of the *Esmeralda* was justified in preventing the *Sportsman* from loading there and in seizing her.

As to the TITLE to this territory we find that:

In the Constitution of Chile of 1822 it was stated—

"The territory of Chile is designated by natural limits. * * * On the north by the Desert of Atacama, etc."

This means that Chile ends where the desert begins, viz: at the Salt River, which is some times located at Chanaral, latitude 26° 20′ south, and some times at Paposa, latitude 25° 45′ south. The Constitution of 1833 says Chile extends

from the Desert of Atacama to Cape Horn, and the treaty of peace with Spain in 1844 says the same. The burden, therefore, rests upon the respondent to show that she had held undisputed possession thereof for a series of years or had acquired the port of Santa Maria and the country which she claimed up to 23° south by conquest or treaty, for she could not, at that date, acquire it by discovery. She has absolutely failed to show that she acquired title to it in either manner.

It was contended, however, on behalf of the respondent Government that: "When the South American Republics became independent States, they proclaimed the principle that their limits should be the same as when they were colonies, a principle known in the public law of the continent by the formula of the *uti possidetis* of 1810." And various maps and histories dated prior to the nineteenth century were cited to sustain its contention that the original Kingdom of Chile extended north to the 23° of south latitude. But by an examination of the documents submitted to sustain this contention, we find a map of the Kingdom of Chile, sent by the then Governor of Chile to the Spanish Government on the 27th of April, 1761, which was very elaborate and divided by provinces into ten sheets, and it included within Chile the Desert of Atacama *to the south* of 24° 37′. It further appears from these documents that in 1803 a Royal Patent ordered that the Desert of Atacama should be incorporated in the future in Peru, after which no change was made in this respect up to the time of the separation of Chile from Spain. And in 1844, by her treaty of independence, with Spain, both recognized that the Desert of Atacama was her natural boundary on the north, and, as we have seen, this southern boundary of the desert was not farther north than 25° 45′. Thus this treaty is conclusive evidence that both countries recognized that Chile's "limits as a colony" did not extend further north than 25° 45′.

What does the record show as to the *possession* by the respondent of the disputed territory?

She did not have possession by her military or civil authorities.

There was no custom-house officer or other official of Chile at or near Santa Maria. The nearest Chilean officials were at Caldera in about 27° south.

The most that is contended for is that by certain acts of the Chilean Congress and statements made by some of her officials, she laid *claim* to this territory. That does not give her *title* or *possession*, however. It is no justification to simply show that she claimed title, but it must be *shown* that *she* had title, or at least undisputed possession of this port at the time when the seizure of the *Sportsman* was made. It matters not in whom the possession or title was unless she shows that she held it. In my opinion she has failed to do this. The Republics of Chile and Bolivia both laid claim to the territory between the 23° and 26° south, within which was situated the port of Santa Maria.

The respondent relies in this case on the following facts to establish her possession.

The President of the Republic in 1842 called the attention of the Congress to the growing importance of guano as a manure, and advised the sending of a commission to explore for the same on the coast of the Republic between the port of Coquimbo and the cape of Mejillones. The Congress thereupon passed an act reciting that deposits of guano existed on the coast of Coquimbo and declaring such deposits to be the property of the nation, and providing that vessels that should extract *guano* from the places lying within that territory, without permit from Chile, would be liable to seizure, etc. It appears from this that the President made some claim to the coast as far as Mejillones, but the act passed by Congress, does not appear to embrace the district north of 28° 40' south, since the maps of that day introduced in evidence, show that the province of Coquimbo did not extend farther north than that point. We should remember also in this connection, that in the treaty with

Spain, acknowledging the independence of Chile which was made but two years later, the northern boundary of Chile was described precisely as in the Constitution of 1833, and limited her territory, on the north, by the Desert of Atacama, and that up to that time Chile derived all of her title and right of possession from Spain.

The Republic of Chile sent a warship to Mejillones in 1847, and threw up a wall, as it is called, of loose stones, however, forming a sort of breastwork 27½ yards long by 8½ in width, walls three feet thick and five feet high. She kept her soldiers ashore there, possibly a few days, and then abandoned the place entirely. We conclude that no garrison was maintained there because it is admitted that all the water for its use would have to be distilled, and all of its provisions be brought from a very long distance, as there was no water, and nothing could be grown there, so it is apparent that no actual possession was taken and maintained in 1847. It further appears that when Don Phillippi was there, a few years later, this wall was in ruins.

In 1845 the Chilean authorities issued seven licenses to one firm, Pelle Machefert Bros., to mine copper near Chimba, and March 20, 1857, she issued two more licenses for the same purpose, to one Carrosini; one of these mines however, was south of Santa Maria. These are all of the licenses to mine copper or other ore, in the disputed territory prior to August 20, 1857, which Chile has produced, and it is fair to assume that she has made the best showing on that point that she could. In 1845, also, Chile made some exploration of the guano islands near the coast as far north as the Island of Chimba. But we find that Chimba is near Paposa, which is in about 45° 15′ south (see the communication of Vallejo, December 11, 1845, respondent's printed evidence, page 2).

In 1853 Don Phillippi was designated to explore the Atacama desert as far as Mejillones. It does not appear when he began his explorations nor at what time he was at

Santa Maria or Mejillones. His work was not published until 1858. The fact that his explorations were merely scientific, would seem to give them very little weight in determining the question of the *possession* of Chile.

These are practically all of the so-called acts of Chile by which she claims to have exercised possession over the territory in dispute prior to the year 1857, and in fact we find that two of these mining licenses were issued in March of the latter year.

On the other hand it appears that a great number of people were mining in that territory under license from Bolivia: for instance, it is stated on page 19 of respondent's printed evidence that "this Intendency (Atacama) has been informed that the firm of Artola & Ossa, who have mining works in that section of the Desert of Atacama known as Mejillones, *does not recognize* the Chilean authorities, as *they consider* the *territory* as *belonging to* the Republic of *Bolivia*." Also, on page 25 it appears that a Mr. Tula desired to take out a mining permit on the 12*th* day of *September*, 1857, he having been notified by the commander of the Chilean warship *Esmeralda* on the 21*st of August ulto.* to take out such license. On page 24 it *appears that this lode* had been worked since October 1, 1854, without license from Chile. On page 26 it appears that the same Mr. Tula had been for over two years working another mine in this same territory, and that on account of this notification given by the commander of the *Esmeralda* in August he made application to the Chilean authorities *September* 12, 1857, for license from that country. On page 27 it appears, under date of September 19, 1857, that the notification to the miners working copper in the northern extremity of the Republic, etc., was first given by the *Esmeralda*. These notices were given August 20, 1857, *the very day* the *Esmeralda* interfered with the loading of the *Sportsman* (pp. 35 and 42).

It also appears under date of SEPTEMBER 19, 1857 (pp. 27, 28), that the miners in the vicinity of Mejillones, which was

north of Santa Maria, had *just submitted to Chilean authority.* It further appears from the evidence that there were many mines in this portion of the desert and many very rich ones near Mejillones, yet, as we have pointed out, Chile seems to have issued only seven licenses in this district to miners *prior* to 1857, and these all on the same day and to the same firm.

It further appears on page 28 that the miners in that section had received their supplies from Cobija, in Bolivia, without paying any revenue to the Chilean Government, and also that the Chilean authorities *had no knowledge of these mines until this time. Chile then first took proceedings to establish a subdelegation at Mejillones* (p. 28). It was not established until *September* 10, 1857. It further appears (p. 28) that both Mejillones and Santa Maria had been frequently visited by launches from Cobija, Bolivia, with provisions, and that they paid no custom dues to Chile. It appears (p. 28) that on the 20th of August, 1857, another boat besides the *Sportsman* was engaged in loading near Santa Maria without authority from Chile. It is admitted (p. 33) that the miners throughout that district had been in the habit of procuring their provisions from Cobija without paying any duty to Chile. It also appears (p. 61) that cargoes of ore had been shipped at Mejillones and Constitucion without any license from the Chilean Government.

It is apparent from the evidence printed by the respondent Government, and other evidence in this case, that prior to the seizure of the *Sportsman*, ships had obtained licenses from Bolivia to put in cargo at various ports in this disputed territory, including Santa Maria and Mejillones, and that Bolivia had issued a great many mining licenses for mining therein, and that ships had frequently loaded within the territory under license from Bolivia, or at least without any license from Chile, and that it was not until about the time that the *Sportsman* was stopped from loading at this port that any effort was made on the part of Chile to pre-

vent vessels from loading there, or to prevent people from mining in that section without a license from Chile.

If any licenses to load vessels in that vicinity had been given by Chile it is fair to assume that she would have produced them, in connection with the numerous other documents submitted in the case. They seem to be entirely lacking, however, possibly with one exception, found on the first and second pages of respondent's printed evidence. It is true that in a circular, sent by the Minister of Chile for Foreign Affairs to the representatives of the various foreign governments at Santiago, *February* 13, 1879, explaining the position of Chile in reference to the war with Bolivia, it is stated that between 1842 and 1857 there had been issued at Valparaiso 113 licenses to ships of all nationalities to take on cargo of *guano* at Mejillones, Angamos, Santa Maria, and *other ports* on the coast of the desert. As the desert extends south as far at least as 25° 45', and according to some authorities 26° 20', this statement, aside from its being made long after the events in question here occurred, may be entirely correct and yet not prove that Chile had issued more than two or three licenses to take on cargo at Mejillones and Santa Maria, for there were many such ports on the coast of the desert. It will be observed, also, that not one of these licenses was for loading *ore* but all of them for loading *guano*. It will be further found by reference to pages 60 and 61 that it was the report of the *Esmeralda* on this trip (when she seized the *Sportsman*) that led Chile to discover the importance of this territory, and that it was becoming rich, and which induced her to endeavor to enforce her claims in that section.

When the officers of Bolivia learned of the seizure of the *Sportsman*, the prefect of the littoral department of Bolivia, under date of November 25, 1857, addressed a communication to Commander Goni of the *Esmeralda*, the essential parts of which read as follows:

"This office has just been informed that the Chilean man-of-war *Esmeralda*, under your command, has just anchored in the bay of Mejillones, and it has caused great surprise and displeasure that you should insist in taking measures for the purpose of considering as belonging to Chile that part of territory comprised between degrees twenty-three and twenty-six, latitude south, which territory is universally acknowledged as belonging to the Republic of Bolivia; you have invaded said territory with an armed force, and what is no less alarming and scandalous to the peace of America and of the entire world, a Commission appointed by yourself has begun to fix boundaries on the twenty-third degree, treading under foot the sacred right of the *uti possidetis*, especially adopted, acknowledged and respected by all and every one of the sister Republics of South America, and finally outraging the flag of the nation of Bolivia. * * * It being impossible for me to repel force by force, I confined myself as the first authority of this Department to protest, as I solemnly do protest in the name of my Government, against so remarkable an action actually taken by yourself, perhaps in the name, also, of the Supreme Government of Chile; I protest against the violation of our rights, for the gratuitous injury caused us; against the losses and damages which may be incurred by all *industrials* who under the *protection of our laws* have founded establishments and invested large capitals; and finally I protest against all the consequences which may arise in this connection.

"Impelled by the force of circumstances to address you in these terms, it affords me pleasure to subscribe myself, your obedient servant.—Manuel Tomas Alcalde."

It is apparent from these and other facts in the record that up to the 20th of August, 1857, when the *Sportsman* incident occurred, that Bolivia had exercised more authority in this district than Chile had, and the letter of the Bolivian Minister of Exterior Relations to the Minister of the United States in reference to the seizure of the *Sportsman* shows that Bolivia claimed to be in *actual and undisputed* possession of this section up to that time.

We find also that notwithstanding Chile had made these *claims* to the territory between 23° and 26° south latitude,

that she made a treaty in 1866 with Bolivia, in which it was recited that both countries claimed to have a good title to that territory, and as a compromise it was agreed that the boundary between the two should be thereby fixed at 24° south, so that by it the port of Santa Maria was definitely determined to be in Bolivian territory.

And it is held that where a boundary between two countries is in dispute, and they finally agree upon a boundary line, that it is to be regarded and treated as if it had always been known as the true line.

As a result, titles granted by either claimant, within the territory finally falling to the other, are void and of no force, unless preserved by the articles settling the disputed line. And this is regardless of whether the granting power had actual possession of the territory when the grant was made.

Coffee *v.* Grover, 123 U. S. 22.

That Santa Maria was very generally recognized, up to the time of the seizure of the *Sportsman*, as within the territory of Bolivia, appears from an examination of many standard charts of that day, which were introduced in evidence. Among these we mention the British Admiralty chart of "South America, West Coast, Sheet 10, Bolivia;" Colton's Atlas of the World, published in 1855; an atlas published by Colton, in 1857, under official authority of the Republic of Bolivia, from surveys which she had begun in 1842; Zeitschrift Fur Allgemeine Erdkunde, Vol. VI, p. 176 (1859).

The *first* of these was the *standard chart* for *mariners*. All showed the port of Santa Maria to be well within the territory of Bolivia.

The respondent, therefore, has not shown any absolute title to this section, nor has she shown that she was in actual or exclusive possession, but the evidence seems convincing that prior to the seizure of the *Sportsman*, Bolivia was exercising much greater possessory rights over the terri-

tory, where Santa Maria is situated, than Chile was, and certainly that the latter had no exclusive possession thereof.

If she was not in actual possession she had no right to enforce her revenue laws there.

United States *v.* Rice, 4 Wheat. 246.

The fact that the ship was released without an opportunity to be heard furnishes, a strong presumption that there was no justifiable ground for the seizure, otherwise the captain of the *Esmeralda* would not have hesitated to libel the *Sportsman* and have the justice or injustice of the seizure determined BY the COURTS of *his own* COUNTRY.

That the seizure was without justification, seems to be recognized by the authorities of the respondent Government in the letter dated the 14th of November, 1857, in which the Minister for Foreign Affairs says: "That while the captain of the *Sportsman* has committed an apparent infraction of the law * * * yet he was declared to be without fault."

We also find a communication dated September 1, 1857, in which the Governor of the province, Señor Videla, states that "the Government of Chile will not object to hearing and investigating any just claims for damages caused to the vessel *Sportsman* on account of delay suffered." Thus Chile seemed to recognize that there *was* a liability.

My conclusion is that the respondent Government has failed to justify the action of the captain of the *Esmeralda* in stopping the *Sportsman* from loading and in taking her to Caldera. An award should, therefore, be made for the claimant.

WM. G. GAGE,
Commissioner for the United States.

Attest:
JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

Delivered March 2, 1901.

United States and Chilean Claims Commission

DECISION No. 7.

RICARDO L. TRUMBULL *v.* THE UNITED STATES.	*No.* 27.

Award of the Commissioners.

In the above-entitled matter the sum of three thousand dollars in United States gold coin is awarded in favor of those persons who are now by the laws of Chile entitled to the property and estate which belonged to Ricardo L. Trumbull, the above-named claimant, at the time of his death, which said sum shall be paid by the respondent Government to the Government of Chile in accordance with the terms of the Convention under which this award is made.

J. B. PIODA,
The Commissioner for Switzerland.
C. MORLA VICUÑA,
The Commissioner for Chile.
WM. G. GAGE,
The Commissioner for the United States.

Attest:
JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

Delivered March 23, 1901.

United States and Chilean Claims Commission.

DECISION No. 8.

HENRY S. PREVOST AND CHARLES A. PREVOST *v.* THE REPUBLIC OF CHILE.	*No.* 30.

Decision of the Commission Dismissing Case.

The memorialists in the above-entitled cause claim from the Republic of Chile the sum of $14,373.50, being the amount, with interest, of an alleged illegal war contribution and requisition which had been imposed by the Government of Chile upon an estate (situated in Peruvian territory) of which the claimants were sublessees, during the war of 1880, between Chile and Peru.

The facts of this case are as follows:

In the year 1880 the memoralists were copartners composing the firm and doing business under the firm name of Prevost & Company, at Lima, in the Republic of Peru. They were both born in Lima, where their father was Consul of the United States. It appears that both of them have

always resided and been domiciled in Peru, coming rarely to the United States; that both resided in Peru at the time of the acts hereinafter mentioned, and that at present Henry S. Prevost still resides in Peru, while Charles A. Prevost is for the time being in London, England. It appears that the constitution of Peru, Article 34, provides that, "those who are born in the territory of the Republic" are Peruvians by birth. It is insisted, notwithstanding this, that each has always claimed his status as a citizen of the United States, "never having relinquished or forfeited his status as such citizen or committed any act inconsistent with such status which came to him and always has been, and still is held by him by right of birth."

Prior to September 28, 1880, the firm of Prevost & Company had laid out and advanced large sums of money to the firm of Aspillaga Brothers for the cultivation and improvement of a certain sugar estate (of which said Aspillaga Brothers were lessees) known as the estate of Cayalti, situated in the Province of Chiclayo, in the Department of Lambayeque, in the Republic of Peru. These improvements included the erection of buildings and machinery for the cultivation and development of sugar. The greater part of the sums advanced for these improvements, etc. (about $175,000) was, on September 28, 1880, still due by Aspillaga Brothers to Prevost & Company.

In the month of June, 1880, war had been declared by the Republic of Chile against the Republic of Peru, and armed forces of Chile had entered into and were carrying on hostilities in portions of the Peruvian territory, including the Department above mentioned. Under these circumstances, and in order to protect themselves and to secure the large amount of money which they had advanced for investment in the erection of said machinery and improvements, and which they had increased further after the operations of war were initiated, the claimants, on or about September 28, 1880, procured an instrument in writing to be duly and legally executed at Lima, by the said Aspillaga Brothers,

whereby the estate of Cayalti was sublet to the claimants. This sublease was still in force, and the claimants were in possession of said estate thereunder at the time of the occurrences hereinafter set forth.

Two days after the execution of this lease, an official letter addressed to the commander of the Chilean forces already landed on the coast of Peru near the estate of Cayalti, was sent to the manager of said estate by the United States Minister in Peru, informing the said commander that Henry S. Prevost and Charles A. Prevost were known to him to be citizens of the United States, and had made proof before him that they were tenants under lease of said estate and "exclusive owners of the sugar buildings standing on said property, with the machinery and appurtenances attached thereto, and of the crops of sugar-cane raised within its precincts," and expressing the hope that said property "may be exempt from injury by your (the Chilean) forces." A telegraphic message of like purport was also sent to said manager through the United States Consul at Pacas Mayo, addressed to the commander of the Chilean forces in that vicinity.

It appears that in the latter part of August, 1880, the Chilean forces had already begun to advance into the Department of Lambayeque. On August 24, certain instructions had been sent by the Chilean Minister of War to Don Patricio Lynch, chief of the expedition. These instructions included the following:

"You may impose contributions of war upon the districts that you occupy, and you may exact payment in cash, or in provisions like sugar, cotton, rice, alcohol, etc. The amount of the contribution will be fixed by you prudently, and you will enforce it with all energy, threatening, if necessary, the private individuals and the authorities with the destruction of their property for the purpose of getting the amounts required."

T. F. VERGARA,
Minister of War.

VALPARAISO, *August* 24, 1880.

Soon afterwards General Lynch addressed a communication to the prefect of Lambayeque,

"demanding from him the payment of the moderate sum of 150,000 soles in silver or gold, which I imposed as a war contribution upon the rich and populated department under his charge."

General Lynch, in his official report, continues as follows:

"As the said Prefect refused to comply with my demand and threatened to resist me with armed forces, our division advanced, passing through the towns of Eten, Monecfu, Chiclayo, Pimentel, Lambayeque, and Ferrenafe, obtaining in some of said towns the payment of moderate contributions and in others punishing with humanity the contumacy of their inhabitants, without encountering in any of said towns resistance which deserves to be mentioned in this report.

Upon our passage through the haciendas of Ucupe *and Cayalti* and the townships of Pueblo Nuevo, Guadalupe, San Jose, Chefren, San Pedro and Pacasmayo, they were also requisitioned for contributions of war which the inhabitants paid with the greatest promptness."

The contribution of war or requisition upon the hacienda of Cayalti was made on October 7, 1880, in the following manner:

"No. 3. Republic of Chile.
Commander-in-Chief of the Division of Operations in the North

Cayalti Estate, Oct. 7, 1880.

By order of the Commander in Chief of the Division of the Chilean Army at present occupying this estate and the territory of the Department of Lambayeque I hereby notify you that within the term of 24 hours you must transport, with your own elements to the port of Pimentel, six hundred quintals sugar and [illegible] the sum of one thousand pounds sterling in payment of the war contribution which has been imposed on the estate of Cayalti.

If within the term indicated you have not satisfied this order of the Commander-in-Chief, it will be the painful duty of the forces of our division to raze to the ground the estate commended to your management.

May God have you in his keeping.

D. CARRASCO ALBANO,
Secretary-General.

To the Manager of Cayalti."

The manager of the Cayalti estate at once protested vigorously against this demand, and, among other things, wrote to the Secretary-General as follows:

"As representative of the present *managers* of this estate the Messrs. Prevost & Co., American citizens, I manifest to you that this estate is American property, and as such is under the protection which the Government of the United States of North America concedes to its citizens. That in view of the telegram I annex, it is proved beyond cavil that this estate is in reality American property, under whose protection I shelter myself, to protest in the most emphatic and solemn manner, in the name of the managers of this estate, the said Messrs. Prevost & Co., against the notification which you make me in the name of the Government of Chile in the form above set forth."

In reply to this protest the Secretary-General insisted that the contribution must be paid within the time named. Thereupon, in order to prevent the destruction of the estate, Mr. Aspillaga, after repeating a most formal and solemn protest in writing to the effect that the estate was American property, complied, by delivering the 600 quintals of sugar and a draft for £1,000, drawn by Aspillaga Brothers upon Kendall & Sons, London, at ninety days sight, in favor or for the account of the Agent of the Chilean Government. Separate receipts for the sugar and for the draft, "*in payment of the war contribution* that has been imposed on the estate of Cayalti" were delivered by the Secretary-General to Mr. Aspillaga.

Although Aspillaga Brothers were not authorized to draw upon Kendall & Sons, and the latter had no funds in hand belonging to them to meet the bill, nevertheless, thereafter, in May, 1881, *by voluntary request and authorization of Prevost & Company*, Messrs. Kendall & Sons accepted said bill for the honor of Prevost & Company, and the amount was then paid to the Chilean Government.

After leaving the Department of Lambayeque, General Lynch with his forces marched into the Department of Libertad, from which, on October 16, 1880, he also required the payment of the sum of 150,000 soles as a war contribution. This sum was promptly paid by the inhabitants of that Department.

In his official report (already referred to) General Lynch gives a full account of the contributions made in the Department of Lambayeque, annexing thereto a table "wherein are enumerated the proceeds of the contributions of war imposed on the haciendas and townships of the scoured territory." This report and the table of contributions are in evidence.

In concluding his report, General Lynch commends in high terms "the most brilliant example of morality and discipline" shown by his troops while in the invaded territory, including the Department of Lambayeque.

It is alleged by the memorialists, and is admitted, that neither Henry S. Prevost nor Charles A. Prevost, nor the manager of the Cayalti Estate, at any time took any part in the hostilities between Chile and Peru, but were wholly neutral and non-combatants.

The sums claimed in damages by the memorialists from the Republic of Chile, on account of the alleged illegal war contribution and requisition made as stated above, are $1,980 (the value of 600 quintals of sugar), with interest at 6 per cent. thereon from October 7, 1880; and $4,860 (£1,000 sterling) with interest thereon at 6 per cent. from May 1, 1881. In all about $14,372.50.

According to the brief of the memorialists, their claim is based upon the theory that the acts committed by the Chilean forces were contrary to the usages of war; that under the law of nations and the usages of modern warfare, "the seizure of private property of a non-combatant alien" under the circumstances of this case is not justified, and such seizure therefore constitutes a claim for damages.

On the other hand the respondent Government asserts:

(*a*) That the claimants are not and were not, at the time of the occurrence above set forth, citizens of the United States.

(*b*) That even if they were citizens of the United States, the transfer of property by a belligerent to an alien neutral is invalid.

(*c*) That a belligerent nation has the right to levy contributions of war and requisitions upon property within enemy's territory under its control; that assuming the claimants to have been citizens of the United States, the property of alien neutrals in such territory shares the liability of property belonging to the subjects of that territory, and is not exempt from war contributions and requisitions.

That, consequently, the claim of the memorialists cannot be sustained.

During the argument the questions of citizenship and of transfers of property by a belligerent to a neutral were discussed at much length. Without determining these points, however, and assuming for the purposes of this case that the claimants were and are citizens of the United States, and also that the transfer of the Cayalti lease by Aspillaga Brothers to the claimants was in all respects valid and legal, we pass to the main point in issue, namely, whether or not contributions and requisitions of war, as levied in this case, are justified under the law of nations.

From the evidence in the case (and assuming the claimants to have been United States citizens) the following facts are clear:

There was a state of war between Chile and Peru; opera-

tions of war had been initiated, and there were active military operations, followed by the military occupation of portions of the Peruvian territory, including the Department of Lambayeque, where the claimants' property was situated, by the armed forces of Chile.

The claimants, although aliens and neutrals, were domiciled and resided in enemy territory, and continued so to be domiciled and to reside, for the purposes of trade, during the whole period of hostilities.

General Lynch, the chief of the expedition, had been authorized by the Minister of War of Chile to impose contributions of war upon the districts which he occupied. In pursuance thereof, upon his occupying with his forces the Department of Lambayeque, he addressed a communication to the Prefect of the Department demanding from him the payment of 150,000 soles as a war contribution upon the Department under his charge.

The Prefect, having refused to comply with General Lynch's command, and threatening to resist with armed forces, the latter, as he advanced through the Department, levied contributions and requisitions upon cities, townships, towns, haciendas, and railroads in the Department of Lambayeque.

These contributions appear to have been levied in a regular, orderly manner, and as equally, equitably and uniformly as practicable, especially considering the fact that the Prefect had refused to assess the contributions himself, and had threatened resistance. The contribution levied on the claimants' hacienda differed in no apparent respect from those levied on the property of other inhabitants of the occupied territory. The contributions do not appear to have been excessive or wanton ; and, in return, the evidence shows that the occupied territory was otherwise respected ; that there was no looting or pillage, and that the Chilean forces evercised morality and discipline.

Such being the facts of the case, what are the principles of international law applicable to these facts ?

No principle is more clearly established than the right of a belligerent under the laws of war to levy contributions and requisitions upon enemy property in occupied territory, as military necessity may require, without incurring any obligation or liability therefor. This right has never been denied by any government and has the support of universal custom among nations. With very few exceptions (and these from motives of policy) the right has been exercised in all modern wars, including the war between the United States and Mexico (1847), the Greco-Turkish war of 1897, and notably in the Franco-Prussian war of 1870, when the German forces in France levied contributions and requisitions in enormous amounts.

"It is calculated that in a war which lasted only six months, the occupied districts of France were mulcted in goods of all kinds to the extent of about $80,000,000."
Lawrence International Law, p. 375.
See also Baker's Halleck, Vol. 2, p. 73.
Calvo, Droit International, Sec. 2236.

Referring to certain duties collected as contributions by the United States forces during their occupation of Mexico, the Supreme Court of the United States, in an opinion rendered by Chief Justice Taney, says:

"The duties required to be paid were regulated with this view, and were nothing more than *contributions levied upon the enemy, which the usages of war justify when the army is operating in the enemy's country.*"
Fleming *v.* Page, 9 Howard, 616.

An examination of the messages of the Presidents, and of various executive orders issued during the period of the Mexican war, shows that contributions and requisitions were levied upon enemy property in numerous instances and for large amounts by the United States through its military commanders.

Concerning contributions, President Polk, in his message to the 30th Congress, says:

"The policy of levying upon the enemy contributions in every form, consistently with the laws of nations, which it may be practicable for our military commanders to adopt, should, in my judgment, be rigidly enforced, and orders to this effect have accordingly been given. By such a policy, at the same time, that our own treasury will be relieved from a heavy drain, the Mexican people will be made to feel the burdens of the war, and, consulting their own interests, may be induced the more readily to require their rulers to accede to a just peace."

Concerning requisitions, Mr. Marcy, Secretary of War, in a letter to General Scott, dated April 3, 1847, says:

"The enemy should be made to realize that there are other inducements to make them desire peace, besides the loss of battles, and the burden of their own military establishments. The right of an army, operating in an enemy's country, to seize supplies, to forage, and occupy such buildings, private as well as public, as may be required for quarters, hospitals, storehouses, and other military purposes, without compensation therefor, cannot be questioned; and it is expected that you will not forego the exercise of this right to any extent compatible with the interests of the service in which you are engaged."

To support in part the military occupation by the army of the United States, the several provinces of Mexico, when occupied, were assessed in cash, in the year 1847, over $3,000,000 as contribution of war.

Without a single exception, writers on international law recognize this right of a belligerent to levy contributions and requisitions upon enemy property in occupied territory as necessity may require. As is stated by one of the foremost modern authorities on the law of nations, "*la guerre nourrit la guerre.*"

"The regulated seizure of private property is effected by the levy of contributions and requisitions. No usage is in the course of formation tending to abolish or restrain within specific limits the exercise of the right to levy contributions and requisitions."

Hall, International Law, p. 443.

"Lorsqu'une armée envahit une contrée, il faut qu'elle y subsiste; or, comme elle ne peut être tenue de payer les frais de la guerre ou d'en faire l'avance, la loi de necessité permet d'imposer des contributions ou des requisitions en nature ou en argent et d'appliquer à l'entretien des troupes le produit d'une portion de l'usufruit des terres, dont la libre jouissance et l'exploitation sont laisées aux habitants du pays."

Calvo, droit International, Vol. IV, Sec. 2231.

See also:

Vattel, Law of Nations, Book III, Ch. IX, Sec. 165.
Rivier, Droit des Gens, Vol. II, 324–7.
Bonfils, Droit Int. Public, 610–15.
Martens, Traité de Droit Int., Vol. III, 236–6.
Halleck, Vol. II, 109–14.

Even the regulations adopted by the Peace Conference at the Hague recognize the right of a belligerent to levy contributions and requisitions on enemy territory as military necessity may require (Articles 49, 52).

From the above-settled principle of international law another principle equally well established has logically followed, namely, that neutral alien property in belligerent territory shares the liability of property belonging to subjects of that territory. The property of a foreigner domiciled and established for purposes of trade within a State is liable like that of a subject to such exigencies as the usages of war entail. Such property may be subjected by the invading forces to the same contributions and requisitions as that of a non-combatant enemy.

"A foreigner living and established within the territory of a State is, to a large extent, under its control; he cannot be

made to serve it personally in war, but he contributes by way of payment of ordinary taxes to its support, and his property is liable, like that of subjects, to such extraordinary subsidies as the prosecution of the war may demand. His property being thus an element of strength to the State, it may reasonably be treated as hostile by an enemy."

Hall, International Law, p. 516.

"The general principle that neutral property in belligerent territory shares the liabilities of property belonging to subjects of that State is clear and indisputable, and no objection can be made to its effect upon property which is associated either permanently or for a considerable time with the belligerent territory."

"As neutral individuals within an enemy State are subject to the jurisdiction of that enemy, and are so far intimately associated with him that they cannot be separated from him for many purposes, they and their property are, as a general principle, exposed to the same extent as non-combatant enemy subjects to the consequences of hostilities. * * * *Their property is not exempt from contributions and requisitions.*"

Hall, International Law, 764 765.

Les requisitions sont supportées par les habitants en leur qualité d'habitants ; peu importe qu'ils soient régnicoles ou étrangers, appartenant à un état neutre ou même à l'état de l'armée d'invasion ou à son allié."

"Les sujets des nations neutres, résidant sur le territoire envahi, ont ils droit à des immunités particulières, en matiérs de requisitions faites par l'ennemi ? Nous pensons avec M. Feraud-Giraud que ces étrangers neutres doivent suivre la fortune du pays ou ils ont transporté leur domicile et leurs biens. Leurs proprietés peuvent etre détruites par des nécessités de guerre ; leur mobilier être requisitionné. Le cas s'est presenté pour des Anglais fixés en France pendant la guerre de 1870."

Bonfils, Droit Int. Public, p. 612.

A full account of the cases where the English Government refused to demand reparation from Germany for contributions levied on English subjects residing in France, on

the ground that "British subjects having property in France were not entitled to any special protection for their property, or to exemption from military contributions to which they might be liable in common with the inhabitants," may be found in

Calvo, Droit International, Sec. 2250, 2251.
Halleck, International Law (1893) Vol. II, p. 144.

"The authorities lay down the general principle that neutral property in belligerent territory shares the liabilities of property belonging to subjects of that State."

Mr. Bayard to Mr. O'Connor, Oct. 29, 1885.
Wharton's Digest of Int. Law, Sec. 223.

See also,

Wharton's Digest of Int. Law, Sec. 352–353.
Moore, International Arbitrations, p. 2695.
Phillimore, Int. Law, Vol. III, p. 725.
Wheaton's International Law, Sec. 319.

It is contended by the memorialists that even if neutral property in occupied belligerent territory shares the liability of property belonging to subjects (or, as their brief states, "conceding, then, merely for the sake of the argument that neutral aliens are not entitled to more consideration than resident native Peruvians"), nevertheless, the contributions levied were not levied equally and equitably on all the property in a certain definite district or province; they were not levied in a regular, orderly, uniform manner, and the money should have been collected from the whole district, and not from individuals; and, furthermore, it is claimed, this contribution was enforced against "two persons alone singled out from the whole community," and consequently was a compulsory exaction, an extortionate confiscation, unwarranted by the laws of war.

The evidence introduced in this case and cited above effectually dispose of these contentions. The bare, unsupported statement of Mr. Aspiazu to the fact that the

hacienda of Cayalti was the only estate in the Department of Lambayeque upon which a tax was imposed can hardly prevail against the Official Records of Chile, wherein the exact amounts assessed as war contributions upon the various cities, townships, towns and farms in that Department (and paid by them) are set out carefully and with considerable detail. It is true, as the memorialists assert, and as Mr. Christiancy states in his letter, that "war contributions, according to the best and most approved practice of civilized nations of to-day, should only be exercised upon municipalities or other governmental divisions of a country, leaving the local authorities (who much better know the ability of their respective citizens) to apportion the burden,"—but this is the very practice followed by General Lynch, who demanded from the Prefect of Lambayeque the sum of 150,000 soles as a war contribution upon the whole Department under his charge. It was not until the Prefect refused to comply with this demand, and threatened to resist with armed forces, that General Lynch, as he marched through the Department, levied contributions on the various towns, estates, etc., upon his passage.

Besides, even though the most approved practice of civilized nations may be to levy contributions and requisitions on the various governmental divisions of a country rather than directly upon individuals, yet the latter mode is entirely legal under the laws of war.

"Les requisitions sont perçues directement par l'occupant, ou par l'intermédiaire des autorités locales."
Rivier, Droit des Gens, Vol. 2, p. 324.

It must also be remembered that the levy in this case was made not "upon two persons alone singled out from the whole community," as the claimants assert, but was made upon the farm of Cayalti in common with other farms in the Department of Lambayeque.

A reference to the official table of contributions will show

that most of the farms upon General Lynch's passage in said Department were assessed in the same sum as that imposed upon Cayalti, namely, £1,000, and others were assessed from £500 to £1,500. Consequently the claim that the levy was unequal, inequitable, and not uniform (even if such a claim, under the circumstances, would help the case), can hardly be sustained. Nor can the amount levied be called "extortionate confiscation." Even assuming the estate of Cayalti to have been worth only the sum invested therein by Prevost & Company ($175,000), the amount of the contribution and requisition together (under $7,000) was less than 4 per cent. of their investment.

It is also contended on behalf of the memorialists that because receipts were given by the Secretary-General for the draft and for the sugar, such action denoted that the "seizure" was not a contribution or requisition of war, and implied that compensation therefor would be made thereafter. This position is hardly tenable. It is clearly stated by modern authorities on international law that receipts should be given under such circumstances for several reasons:

"Receipts or bons de requisition are given in acknowledgment of the sums or quantities exacted, in order that other commanders may not make fresh impositions, without knowing the extent of those already levied, and to facilitate the recovery by the inhabitants from their Government of the amounts paid, if the latter concludes on the determination of peace to spread the loss suffered over the nation as a whole."

Hall, International Law, pp. 444, 445.

See also—

Lawrence, International Law, p. 376.

Bonfils, Droit Int. Public, 1216.

In view of the foregoing facts and principles of law, the Commission is of opinion that the claim of the memorialists against the Government of Chile, from whatever aspect it

may be considered, cannot be sustained, and the case is dismissed.

J. B. PIODA,
The Commissioner for Switzerland.
WM. G. GAGE,
The Commissioner for the United States.
C. MORLA VICUÑA,
The Commissioner for Chile.

Attest:
JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

Delivered March 23, 1901.

United States and Chilean Claims Commission

DECISION No. 9.

MAURICIO LEVEK *v.* THE REPUBLIC OF CHILE.	*No.* 41.

Award of the Commissioners.

In the above-entitled matter the sum of five thousand dollars in United States gold coin is awarded in favor of the claimant, which sum shall be paid by the respondent Government to the Government of the United States in accordance with the terms of the Convention under which this award is made.

J. B. PIODA,
The Commissioner for Switzerland.
WM G. GAGE,
The Commissioner for the United States.
C. MORLA VICUÑA,
The Commissioner for Chile.

Attest:
JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

Delivered March 23, 1901.

United States and Chilean Claims Commission.

DECISION No. 10.

WILLIAM W. C. DODGE *v.* THE REPUBLIC OF CHILE.	*No.* 40.

Decision of Commission Dismissing Case.

In the case of William W. C. Dodge *v.* The Republic of Chile, No. 40, it appearing that the claimant filed his memorial before the prior Commission on the 2d day of December, 1893, since which time nothing further has been heard from him; that neither his private attorney nor the Honorable Agent for the United States has been able to learn anything of claimant; therefore, upon motion of the Honorable Agent for Chile, the said claim is hereby dismissed.

J. B. PIODA,
Commissioner for Switzerland.
WM. G. GAGE,
The Commissioner for the United States.
C. MORLA VICUÑA,
The Commissioner for Chile.

Attest:
JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

Delivered April 4, 1901.

United States and Chilean Claims Commission.

DECISION No. 11.

AUSTIN D. MOORE *v.* THE REPUBLIC OF CHILE.	*No.* 35.

Decision of Commission Dismissing Case.

This is a claim for damages on account of the alleged illegal destruction by the naval authorities of Chile, in the years 1880 and 1881, of a two-story dwelling-house owned by the claimant in Ancon, near Callao, on the coast of Peru.

In his memorial the claimant, a citizen of the United States, asserts that on the 23d of September, 1880, the said house was injured to the extent of 1,200 soles by shot or shell fired by vessels of the Chilean navy; and that on the 3d of January, 1881, the said house, or what remained of it, was almost entirely destroyed by shot or shell fired by vessels of the same navy.

The amount of the claim is $7,524, the value of said house, together with interest on said sum from January, 1881.

The facts appear to be as follows:

Early in 1879 war had been declared by Chile against Peru. By the summer of 1880 the Peruvian navy had been

practically wiped out, the only remaining vessels being the corvette *Union*, a slow monitor called the *Atahualpa*, and four iron transports, one of which, the *Rimac*, had been captured from Chile in the previous year.

In July, 1880, the corvette *Union* was blockaded in Callao, the port of Lima, and during that month Callao was bombarded several times by the Chilean navy. The neighboring ports of Chorillos, Ancon, and Chancai, connected with Lima by railway, were also closely blockaded. On the morning of the 3d of July the Chilean warship *Loa*, cruising in front of Callao, discovered a sailboat, laden with fresh provisions, which appeared to have been attempting to run the blockade into Callao, but which had been deserted by its crew. Shortly after this boat had been brought alongside the *Loa*, a terrific explosion took place, sinking the warship in a few minutes and killing or drowning 120 men. It was discovered that the sailboat was loaded with dynamite concealed under the provisions. In September the Chilean gunboat *Covadonga* met the same fate in nearly the same way. The *Covadonga*, while patrolling the Bay of Chancai, picked up a floating rowboat, which suddenly exploded, completely destroying the gunboat and killing many of its crew. The Peruvians, who were watching the result from the shore, started out at once with steam launches to capture the survivors, but the latter were rescued by the Chilean ship *Vilcomayo*, which had been cruising in front of Ancon.

Shortly after the loss of the *Covadonga*, Admiral Riveros, the commander of the Chilean Squadron, sent to the Military Chief of Callao the following notification:

"OFFICE OF THE COMMANDER-IN-CHIEF OF THE SQUADRON, AT ANCHOR AT CALLAO (ROADSTEAD OF).

"SEPTEMBER 21, 1880.

"*To the Political and Military Chief of Callao:*

"SIR: On account of the treacherous ambush which has caused the loss of the gunboat *Covadonga* in the port of

Chancai, I have received instructions from my Government to bombard the ports of Chorillos, Ancon, and Chancai, if in the space of twenty-four hours the Government of Peru has not delivered up to this squadron the corvette *Union* and the transport *Rimac*.

"I inform you of this for the consequent results, warning you that if the morning of the 22d instant, at 12 M., the said vessels *Union* and *Rimac* have not been surrendered to me, the bombardment of the ports above mentioned will begin without other notice.

"GALVARINO RIVEROS."

Upon the refusal of the Military Chief to surrender said vessels, the bombardment of the three ports took place at the time named in the notice. About 140 projectiles were discharged over Ancon. One of these, it is alleged, struck the claimant's house and damaged it to the extent of 1,200 soles.

The events which took place on January 3, 1881 (called in the memorial "the second bombardment"), during which the claimant's house was almost totally destroyed, are mentioned in the report of Lieutenant Mason to the Secretary of the Navy of the United States, dated July 10, 1883, printed as a public document, and described as "The War on the Pacific Coast of South America Between Chile and the Allied Republics of Peru and Bolivia, 1879–'81, War Series No. 11."

On page 72 of this publication the following account is given:

"On the 3d of January an unsuccessful attempt was made to blow up the *Huascar*; a tug was fitted with a Lay torpedo for the purpose. Instead of attacking the *Huascar*, the officer in charge took the tug *into Ancon Bay*, where he destroyed the torpedo and beached his vessel. Here she was discovered and entirely demolished, the next morning, by the *Pilcomayo*, *Talton*, and a torpedo boat. *The Chilean shells set fire to a portion of the town of Ancon.* Some Peruvian reserves, and the guns of the railroad battery previ-

ously referred to, which had been run down the Ancon road, replied to the fire, but without effect."

A somewhat fuller account of this occurrence is given by Lieutenant N. P. Houston, U. S. Navy, on board the U. S. S. *Lackawana*, off Callao, Peru, in a report on file in the Navy Department:

"On Monday evening, the 3d of January, an attempt was made by the Peruvians to blow up the iron-clad Chilean vessel, the *Huascar*. They had for several weeks previously been repairing the hull, boilers, and engines of the only reliable boat they owned, fitting her with everything that could insure success. The idea was to approach the *Huascar* at a very early hour in the morning, then discharge a Lay torpedo. In case of success, the torpedo boat was to stand out to sea and watch her opportunity to regain the port of Callao.

"The attempt resulted in a disastrous failure; the boat was taken in the bay of Ancon, the Lay torpedo sunk, and the boat itself run up on the beach opposite the town Ancon, and deserted by her crew. A Chilean torpedo boat discovered her lying there, and, as a consequence, the following morning the screw steamer *Pilcomayo*, accompanied by the *Tolten* and a torpedo boat, came in and opened fire on the torpedo boat of the Peruvians, utterly destroying her. *The shells from the Chilean guns set fire to the town of Ancon, destroying a number of houses. An attempt was made to defend the town during the fight* by several battalions of the reserve and by the Batteria Volante, which consisted of four muzzle-loading steel guns, mounted on a flat car. The guns were 12-pounders, with small wooden carriages, the recoil being checked by a breeching going through the carriage and shackling to the side of the car. An ordinary freight car rendered bullet-proof was used to carry the ammunition. This battery had been run down from Lima on the morning of the fight. I saw it subsequently in the general engagements at Miraflores and Chorillos, where it was very efficiently served and undoubtedly did much damage to the enemy. After the dispersion of the Peruvian army the battery was run some distance down the Ancon railroad, the guns dismounted and buried in the sand."

Upon such a state of facts the memorialist bases his claim for recovery on the following grounds:

(A) "When, on the 23d of September, the town was bombarded by the Chileans, it does not appear that there were then any Peruvian troops there, or any defensive work, or that there was any engagement with the enemy on land or water."

(B) "There was no cause or excuse for the firing on the 3d of January unless it was the destruction of the torpedo boat which lay at the water's edge, and which could have been destroyed without firing at the houses in the town on higher ground and some distance away."

Except as to citizenship, title to the property and the amount of damages, no testimony whatever was adduced by the claimant, who simply refers to the report of Lieutenant Mason, cited above, and adds, "I was informed that there was no resistance when the bombardments took place."

In his brief counsel for the claimant states:

"The destruction of the property of the claimant, a citizen of the United States, by a Chilean vessel of war, is an injury in respect of which indemnity is due unless good cause or justification for the injury is shown."

Whatever may be the theories of certain writers on international law concerning the inhumanity of bombardments (and in such humanitarian theories we heartily concur), it has been the almost universal practice of nations to refuse to admit reclamations for losses sustained by neutrals, in common with other inhabitants, through such bombardments, and this even when there had been no previous declaration of war, no reasonable ground upon which the bombardment could be justified, and when no defense was made and the place bombarded was not fortified. After the bombardment of Valparaiso by the Spanish fleet in 1866, certain United States firms, domiciled for commercial purposes in that city, having sustained losses of merchandise in the conflagration

caused by the projectiles, appealed to the State Department for the intervention of the United States on their behalf for indemnity against Spain or Chile.

Although, as the claimant states in his brief, this bombardment may have "given rise to universal indignation at the time," yet Mr. Stanbury, the Attorney-General, in a carefully considered opinion to the Secretary of State, states as follows:

"I do not see any ground upon which such intervention is allowable in respect to either of those Governments. The bombardment was in the prosecution of an existing war between Spain and Chile. Although, under the circumstances, it was a measure of extreme severity, yet it cannot be said to have been contrary to the laws of war, nor was it unattended with the preliminary warning to noncombatants usual in such cases.

"It does not appear that in carrying on the bombardment any discrimination was made against resident foreigners or their property. * * *

"*No defence was made against the bombardment*, for that would have been fruitless, and would have aggravated the damage, *as Valparaiso was not then fortified*, and no discrimination was made by those authorities between their own citizens and foreigners there domiciled. All shared alike in the common disaster.

"The rule of international law is well established that a foreigner who resides in the country of a belligerent can claim no indemnity for losses of property occasioned by acts of war like the one in question.

"The bombardment of Copenhagen by the British in 1807 is a notable illustration of this rule. Immense losses were sustained by foreigners domiciled in that city. There was no previous declaration of war against Denmark, *and no reason existed upon which the bombardment could be justified*, and yet no reclamation upon the footing of these losses was ever admitted by Great Britain. The bombardment of Greytown, in May, 1854, by the United States sloop-of-war *Cyane*, is another instance of this rule. Losses were sustained by French citizens there domiciled from the fire of the *Cyane*. A petition to the United States from those parties for indemnity was presented through the French

Minister then resident at Washington, but without the express sanction of his Government. Upon full consideration this petition was refused. Mr. Marcy, then Secretary of State, in answer to the claim, holds the following language: 'The undersigned is not aware that the principle that foreigners domiciled in a belligerent country must share with the citizens of that country in the fortunes of war, has ever been seriously controverted or departed from in practice.'

"I have therefore to repeat that I am of opinion no ground is laid for the intervention of the United States in favor of these parties."

II Wharton's Digest of Int. Law, pp. 585, 6.

The bombardment of Greytown in 1854 by the U. S. S. *Cyane*, mentioned above by Mr. Stanbury, was another instance. There was no war between the two countries, Greytown was an unfortified port, and no armed resistance was offered by the inhabitants. The circumstances which led to this bombardment are stated by President Pierce in his second annual message to the Congress of the United States in 1854, and in substance are as follows:

The rich gold mines of California had recently been discovered, and a very valuable commerce to and from these gold regions was constantly passing at the doors of Greytown. A corporation, the stock of which was principally owned by United States citizens, was engaged in transporting this commerce across the Isthmus. The buildings of the corporation and its headquarters on the eastern side of the Isthmus were at Punta Arenas, which was opposite Greytown. The property of this corporation and goods being transported had been plundered, and some of the buildings had been burned by desparadoes, who sought shelter in Greytown, where they were protected from arrest by the authorities. Greytown was, in fact, in the possession of a band of freebooters, who acknowledged no superior government whatever, and from whom no satisfaction and no reparation for such injuries could be procured.

The American Minister in Central America visited Greytown, and while there, a mob, including some of the so-called functionaries of the place, surrounded the house in which he was and avowed they had come to arrest him by order of some person exercising the chief authority. While parleying with them he was wounded by a missle from the crowd. A boat dispatched from an American steamer to release him from the perilous situation, in which he found himself, was fired into by the town guard and compelled to return. The community of Greytown was well provided with ordnance, small arms, and ammunition, and might easily have seized upon the unarmed boats, freighted with millions, which passed almost daily within its reach. It did not stand before the world in the attitude of an organized political society, being neither competent to exercise the rights or discharge the obligations of a government. It was, in fact, a marauding establishment, too dangerous to be disregarded and too guilty to remain unpunished, and yet incapable of being treated in any other way than as a piratical resort for outlaws. Under these circumstances the United States sent the *Cyane* to Greytown and demanded redress for these injuries. The redress not being given nor any apology offered, the town was bombarded. Much property of unoffending neutrals was destroyed, but the State Department uniformly declined to entertain any claim for indemnification.

Lord Palmerston, in a discussion of the Greytown bombardment, in the House of Commons, in 1857, said:

"It is undoubtedly a principle of international law that when one Government deems it right to exercise rights of hostility against the territory of another power, the subjects of a third power who may happen to be residents in the place attacked have no claim whatever upon the Government which, *in the exercise of its constitutional rights, commits* the acts of hostility."

"We are advised, and I think rightly, that British subjects at Greytown had no ground on which they could call upon the Government of this country to demand from the

Government of the United States compensation for the injuries which they suffered from the attack upon that town. *We may think that the attack was not justified by the cause which was assigned. But as an independent state we have no right to judge the motives which actuated another state in vindicating wrongs which they supposed they had sustained.*"

"Her Majesty's Government, therefore, acting under the advice of those who are most competent to give an opinion upon the subject, and deeming the advice in accordance with international practice, have foregone demanding any compensation of the United States for such subjects of Great Britain injured by the bombardment of Greytown."

Wharton's Digest of Int. Law, pp. 596–7.

It is a well-settled doctrine of international law that every independent Government must determine for itself whether it is justified in an act of war. The bombardment of Greytown and other instances mentioned come within this rule, and for like reasons every independent Government must be allowed to decide for itself whether it has cause for reprisal or retaliation upon its foe. Doubtless cases may arise in which a neutral injured by an unjustifiable bombardment would be entitled to reclamation.

The only case cited by claimant to sustain his contention that he was entitled to an award for the destruction of his house by the bombardment in question was the case of Cuneo *v.* The Republic of Chile, under a Convention between Italy and Chile, wherein Señor Lopez Netto, the President of the Commission, appointed by the Emperor of Brazil, awarded damages for the destruction of property of the claimant, a citizen of Italy, by reason of the bombardment of the Peruvian port of Pisagua by the Chilean navy in the year 1879. In that case the town of Pisagua, an open, undefended port, had "received no summons or notice of bombardment, and no necessity of war justified the omission of the warning."

This opinion of Señor Netto gave rise to much discussion and unfavorable criticism. Moore, in his International

Arbitrations (p. 4930), commenting on the case, says that shortly after rendering the above decision—

"Senhor Lopez Netto returned to Brazil on the ground of ill health. The Emperor appointed to succeed him Senhor Lafayette Rodriguez, whose views differed in many respects from those of his predecessor. *It seems that no more claims growing out of bombardment were allowed.*"

Under these circumstances and being unsupported by other decisions, it can hardly be said that the rulings in the case of Cuneo *v.* The Republic of Chile have become accepted precedents in international law.

In the present case the Peruvians, in blowing up the Chilean ships in front of the blockaded ports by means of concealed charges of dynamite, committed acts, which, whether recognized as justifiable in warfare or not, are, from the point of view of humanity, quite as clearly acts of "incredulous ferocity" (to use the claimant's words) as the bombardment of a town after ample notice is given to its inhabitants to withdraw themselves and their property from peril. Directly after this destruction of their ships the Chileans, in order to "vindicate wrongs which they supposed they had sustained" (as Lord Palmerston says concerning the Greytown case), threatened to bombard the three blockaded ports unless the *Union* and *Rimac* were delivered. Upon refusal and *after due and ample notice*, they bombarded Ancon on September 23 for six hours. On January 3 (when the greater part of the damage occurred) there appears to have been no "bombardment" at all, for the evidence only shows that, while attempting to destroy a torpedo boat which had been beached by the Peruvians at Ancon, "the shells from the Chilean guns set fire to the town of Ancon, destroying a number of houses."

In view of the facts in this case and of the accepted rules of international law as applied to them, it is clear that the acts complained of were incident to military or naval opera-

tions against an enemy and cannot be said to be contrary to the laws of war. The property of alien residents, like that of natives, when in the track of war, is subject to war's casualties. The claimant "was the victim of a calamity, but not of an injury." The case must therefore be dismissed.

J. B. PIODA,
Commissioner for Switzerland.
WM. G. GAGE,
Commissioner for the United States.
C. MORLA VICUÑA,
Commissioner for Chile.

Attest:
JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

Delivered April 10, 1901.

United States and Chilean Claims Commission.

DECISION NO. 12.

CLIFFORD D. BLODGETT *v.* THE REPUBLIC OF CHILE.	*No.* 14.

Decision of Commission Dismissing Case.

This case is brought by Clifford D. Blodgett, a citizen of the United States, who claims from the Republic of Chile the sum of $3,145.40, together with interest on said sum, as indemnity for losses alleged to have occurred on August 28, 1891, in the city of Valparaiso, by reason of the unlawful destruction of goods, wares, and merchandise by Chilean soldiers.

The facts of the case are as follows:

The battle of Placilla, a bloody engagement which put an end to the civil war in Chile, was fought on August 28, 1891. The battle ended about ten o'clock in the morning, and many of the defeated soldiers of Balmaceda took refuge in Valparaiso, distant some two or three miles from the field of battle.

Shortly after eleven o'clock, the Intendente of Valparaiso,

Rear-Admiral Viel, convinced that he was powerless to continue resistance, in order to assure public order, requested the commanders of the foreign ships to land marines who might intervene in the surrender of the city to the victors. At midday about seven hundred marines of the German, English, French, and United States ships were disembarked and distributed in the quarters of the city mainly inhabited by foreigners. They remained stationed there during the day and the following night.

Between one and two o'clock P. M., on the same day, August 28th, the victorious Congressional forces began to enter the city of Valparaiso, which had duly surrendered. Orders had been given to the commanders of the regiments to proceed with their troops to the city in perfect order. It appears from the evidence (printed deposition of Mr. Eastman, pp. 10, 12, 15), that these troops were at once distributed in the different barracks, theatres, and other public buildings in the city; that strict orders were given to keep them there, and that patrols of artillery soldiers were organized to do police service and to prevent riots and disturbances.

In spite of these precautions, disturbances and riots occurred during the afternoon and night, the dead bodies of soldiers of both armies being found in the streets next morning. There was also some looting, although it is not shown whether it was done by victors or vanquished. According to the official telegrams from the commander of the English fleet and from the English consul-general, as night was beginning scattered soldiers and a certain portion of the populace committed excesses at the two extremities of the city and burned several houses. It appears that between five and six P. M., on August 28th, the house of the claimant, which was situated in a remote part of the city, was broken into and its contents either carried off or destroyed by "Chilean soldiers." The evidence concerning the perpetrators of this act, however, is extremely meagre,

vague, and indefinite, consisting only of a few sentences in the depositions of the claimant and his wife.

These statements are as follows:

"Between the hours of five and six o'clock the evening of that day a large body of Chilean soldiers, *apparently in opposition uniform, although I cannot state definitely whether they belonged to one side or the other*, or their rank or employment. All had guns and were well equipped, and had plenty of ammunition. It was hard to estimate the number for the streets were full of them."

Deposition of Clifford D. Blodgett (Int. No. 10).

"Int. 9. Now, just state what happened during the afternoon and night of August 28, 1891?

"Ans. Soldiers with guns broke in through the windows, opened the locked door and took out the bar; then they destroyed all the furniture, drank up or carried away the liquors, and took away all the provisions, and completely wrecked the place. My husband, myself and inmates fled through the skylight onto the roof, where we remained from about six o'clock in the evening until four o'clock next morning.

"Int. 10. Did you know the names, rank or employment of the persons who thus entered your place?

"Ans. *I only know that they were Chilean soldiers.*"

Deposition of Aurora P. Blodgett.

The above is actually the only evidence in the case by which an attempt is made to show that the injuries complained of were committed by the civil or military authorities of Chile. There is no proof whatever showing that these "Chilean soldiers" belonged to the regular army, that they were under the command, supervision or orders of their officers; nor has the claimant proved that the authorities showed grave negligence in preventing and repressing such acts, or that the occurrence could have been averted by the exercise of reasonable care on the part of the authorities.

It is an [illegible] principle of international law that governments are not responsible for pillage, destruction of

property, etc., caused by armed soldiers outside the ranks without the orders or supervision of their officers, or when the latter could not prevent them; or by mobs in time of internal disturbance, unless the acts committed could have been averted by the exercise of reasonable care on the part of the authorities.

A reference to a few of the text-books and cases on this subject will be sufficient.

In the often-cited case of Lawrence Smith, an Englishman living in France, whose house was sacked and burned in 1871 by German soldiers not under supervision of officers, Lord Granville, upon an application for redress, replied that the English government was of opinion that no demand for indemnity could be upheld, for it was evident that "la destruction de la propriété etait un acte de violence commis par les troupes prussiennes *par suite du relâchement de la discipline.*"

. Calvo, Le Droit Int. IV, Sec. 2252.

Hallock's Int. Law (Baker's Ed.) Ch. 24, Sec. 3, Note.

In numerous cases before the Commission under the convention between the United States and Mexico of 1868, it was held by Sir Edward Thornton, as umpire that "the Government was not liable for the acts of individual soldiers or of bodies of straggling or marauding soldiers not under the command of an officer." (Moore, p. 2996.)

Thus, in the Tripler case, Sir Edward Thornton says:

"It is not clearly shown by whom the acts were committed, or that they were done by order or in presence of an officer or officers; and if the robbery and destruction were committed by soldiers only, without the order or presence of an officer, the umpire does not consider that the Mexican government can be expected or called upon to make compensation for such acts. It is one of the unfortunate consequences of choosing to live in a country where revolutions and disturbances are so frequent."

(Moore, Int. Arbitrations, pp. 2996, 2997.

In Hayden's case the claimant alleged that his goods were made spoils of by "Mexican troops," but "no description of the Mexican troops by whom it is alleged this outrage was perpetrated was given."

The Commissioners said:

"The claimant is entitled to an award only upon the assumption that his property was taken or destroyed by persons for whose conduct the Mexican government was responsible. If they were taken by order of an officer in command of a detachment of the army for the public service, such a responsibility would doubtless have attached. * * * The 'Mexican troops,' by whom the goods were taken, for all that appears to the contrary, may have been a body of marauding soldiers, under the command of no regular officer, for purposes of plunder. * * * The board is compelled to decide that the proofs do not make out a valid claim."

(Moore, Int. Arbitrations, p. 2995.)

In the Castelain case (under the Convention of 1880 between the United States and France) a Frenchman and his wife who kept a grocery store, including a supply of spirituous liquors, near Cairo, Illinois, had their stock wrecked and were seriously injured personally by soldiers in the year 1864. A military commission, appointed to investigate the affair, reported that the outrages were committed by United States soldiers and that the provost-marshal was to blame for not taking more prompt and effective measures to identify the offenders and bring them to punishment. Upon this report the provost-marshal was dismissed from the service.

It was claimed by counsel for the Castelains that this action on the part of the United States fixed its liability for the injuries to the persons and property of the claimants.

The claim was disallowed, however, by the unanimous vote of the Commission, which said that while the claimants had been cruelly attacked by soldiers, yet—

"We do not find any act committed by the authorities creating a responsibility on the part of the United States We regret that we are not allowed to indulge in sentiments of pity or to extend charity to persons so cruelly injured."
Moore, Int. Arbitrations, p. 3000.

Hall, in the latest edition of his International Law, says:

"When a government is temporarily unable to control the acts of private persons within its dominions, owing to insurrection or civil commotion, it is not responsible for injury which may be received by foreign subjects in their person or property in the course of the struggle, either through the measures which it may be obliged to take for the recovery of its authority, or through acts done by the part of the population which has broken loose from control. Where strangers enter a State they must be prepared for the risks of intestine war, because the occurrence is one over which, from the nature of the case, the government can have no control; and they cannot demand compensation for losses or injuries received, both because, unless it can be shown that a State is not reasonably well ordered, it is not bound to do more for foreigners than for its own subjects, and no government compensates its subjects for losses or injuries suffered in the course of civil commotions, and *because the highest interests of the State itself are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part which would affect it with responsibility towards a foreign State.*"
Hall, Int. Law, pp, 231-2.

See also—
Vidal's Case, Moore's Int. Arb., p. 2999.
Calvo, Le Droit Int., Vol. III, sec. 1748.
Bluntschli, Droit Int. Codifié, Art. 380 bis.
Field, Int. Code, p. 289, sec. 721 (1st ed.)

These principles of international law were followed by the Anglo-Chilean Commission of 1894 6 in disposing of cases, *identical with the Blodgett case*, growing out of

injuries to property by soldiers, after the battle of Placilla, on the evening and night of August 28, 1891, in the city of Valparaiso. The President of the Commission was M. Camille Janssen, the eminent international jurist, who was appointed by the King of the Belgians. Five cases under this head were presented. The testimony in support of these cases was taken in Chile (where the Commission sat) shortly after the events, so that the claimants had every opportunity to procure evidence. In the first case, Egerton *v.* The Republic of Chile (No. 3), the claimant stated as follows:

"About ten o'clock, more or less, a number of soldiers, one hundred or more, clothed in the white uniform of the victorious troops, forced the doors of the houses extending from No. 444 to the corner of the street Doce de Febrero, and carried off everything that they could with them. On attempting to save my property, I was thrown to the ground and received a small wound in the face from a gun-barrel. I was obliged to flee from the house, clothed only in my pataloons and shirt, in order to save my life. A few minutes afterwards the pillagers intentionally set fire to the house, which was in ruins, and in it lost all my clothing, trunks, and personal property."

The Commission, in dismissing this case (and also the four other cases, on the same grounds), said:

"On the facts, as officially reported by foreign officials who were present, it is shown that if in spite of the measures which were taken, grave disturbances occurred in Valparaiso on the night of the 28th–29th of August, 1891, the Government cannot be made responsible for this, since in the difficult circumstances at that time, after a bloody battle terminating a civil war which greatly excited the spirits of the people, it had taken all the measures within its power; the extreme decision to solicit from the commanders of the squadrons the disembarkation of foreign troops proved sufficiently that there was on the part of the Government neither negligence nor lack of foresight of a kind to impose respon-

sibility upon it. The claimant confines himself to the assertion that a party of soldiers invaded the house which he occupied, at one of the extremities of the city of Valparaiso, without proving whether these soldiers were under the vigilance of their chiefs, and without proving that they belonged to the regular army; it is shown, on the contrary, from the official communications cited above, as being probably the case, and as is also stated by the commander of the English squadron, the British consul-general, and other foreign functionaries, that the excesses were committed by fugitive soldiers and an armed mob, excesses which the authorities were at that moment in impossibility of repressing.

"When a government is temporarily incapacitated from exercising dominion within its territory over the acts of individuals or a part of the people which has withdrawn from its authority, either by a revolt, by a civil war, or by local disturbances, it is not responsible for the injuries suffered by foreigners.

"If international law prescribes to the military authorities of a belligerent nation that it should exercise all means in order to make the property of all pacific citizens respected by all persons under its jurisdiction, there is nothing to show that the excesses experienced by the city of Valparaiso were perpetrated by the soldiers of the victorious army—the only ones over which the officers had preserved any authority. It is likewise accepted as a legal principle and by the decisions of tribunals that the acts of marauding or pillage practiced by soldiers outside of the ranks and the immediate supervision of their officers do not affect the responsibility of governments. Such acts are considered as common crimes, subject to punishment by the ordinary law."

See also the case of Mitchell *v.* The Republic of Chile (No. 36), decided by the same Commission.

In the case of Louis Thompson (No. 56) whose house in Santiago was sacked under nearly the same circumstances on the night following, August 29, 1891, the Commission, in dismissing the case, said:

"The lamentable occurrences which occasioned the injuries to the claimant and for which he solicits an indemnity

cannot fix a responsibility upon the Government of Chile unless they were committed by persons under the orders of that Government or under its supervision; or that the authorities, although having sufficient means at their command to prevent the pillaging, did not prevent it.

"Nor has the claimant proved that the chief authorities of Santiago showed grave negligence (italicised in the decision) to prevent and repress these excesses which are the sad result of a profound internal dissention, nor that the forces of which they disposed received an order not to prevent the pillage, as the claimant has stated. The evidence before the tribunal shows that as soon as the supreme authority established at that time had notice of the pillage, it took all measures demanded by the circumstances. These measures were necessarily very limited, since the entire police had been disbanded and since the troops belonging to the party which had just been irretrievably conquered had lost their chief and were naturally demoralized.

"The authorities take what precautions they can in such a critical moment to prevent the renewal of these outbreaks and to restrain their consequences."

In almost all the cases in point cited in the claimant's brief and in argument, the acts complained were committed either by the order of the officers or authorities, or by soldiers under the supervision of officers, or by the latters' orders, or gross negligence was shown on the part of the authorities. Such were notably the facts in the case of Chorreau and of Bertrand (Moore, p. 3705), both of which were cotton cases; and in the cases of Barrington (Moore, p. 3674), and of Jeannaud (Moore, p. 3000), where the acts complained of occurred while under the command of officers. In the case of Terry and Angus (Moore, p. 2994), the umpire says: "There is good reason to suppose this outrage was perpetrated by the order of General Rea." In the Jeannotat case, "it was the military force commanded by officers who put it in the power of the convicts and incited the mob to assist them in their acts of violence and plunder."

In the Shrigley case (cited by the Hon. Agent for the

United States as conclusive here), decided by the former Commission, the property of the claimant, who resided at Miramar, Chile, was despoiled and carried away on August 14, 1891, "*by certain troops of the Balmaceda government under command of their officers.*" In deciding in favor of the claimant, the Commission laid down the following propositions (among others):

"Neutral property destroyed or taken by soldiers of a belligerent with authorization, *or in presence of their officers or commanders*, gives a right to compensation whenever the facts can be proved that said officers or commanders had the means of preventing the outrage, and did not make the necessary efforts to prevent it.

"Acts of simple marauding or pillage practiced by soldiers absent from their regiments and from the close vigilance of their commanders do not affect the responsibility of governments. Such acts are considered as common crimes, subject only to ordinary penalties."

Applying the principles laid down above, including those in the Shrigley case, to the facts herein, it is hard to see how the Government of Chile can be held responsible. The acts complained of occurred in time of war and of great internal commotion. A bloody and decisive battle had been fought in the morning, and the city of Valparaiso had been occupied by the victorious Congressional troops only three or four hours before the damage to the claimant's property was done. Both the vanquished and victors apparently did what they could in such a crisis to preserve order. At midday, before abandoning the city to the invading army, Admiral Viel, with great foresight, requested the foreign ships to land marines to help in preventing excesses. Certainly this was the most that could be done by authorities in the act of retreat. It is in evidence that the victorious troops, on entering the city, were at once distributed in the different barracks, theatres, etc.; that strict orders were given to keep them there, and that the guards over them

were doubled. This was to prevent looting by the Congressional soldiers. It is also in evidence that patrols of artillery soldiers were organized to do police service, as no police could be found, and that the troops were distributed throughout the city to maintain order and to prevent riots and disturbances. This shows that the authorities took what reasonable measures and precautions they could in such a critical moment. These measures were necessarily imperfect, and under the circumstances it could not be expected that perfect order should be preserved. Certainly it has not been proved that the authorities showed grave negligence or even carelessness, or that they could have prevented the outrage. Whatever may be the moral claim of the memorialist to sympathy and compensation, no indemnity can be granted under the rules and practice of international law.

The case must be dismissed.

J. B. PIODA,
Commissioner for Switzerland.
C. MORLA VICUÑA,
Commissioner for Chile.

I cannot give my assent to some parts of the foregoing opinion of my honorable colleagues, and therefore do not join therein. Nevertheless, it seems clear to me that the claimant has failed to establish by preponderance of evidence that the injuries of which he complains were caused by acts of the authorities of the Republic of Chile, or that they were due to such negligence on the part of its authorities as makes the Republic responsible for claimant's losses, and I therefore concur in the result.

WM. G. GAGE,
Commissioner on the part of the United States.

Attest:
JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

Delivered May 11, 1901.

United States and Chilean Claims Commission

DECISION No. 13.

PETER BACIGALUPI *v.* THE REPUBLIC OF CHILE.	*No.* 42.

Decision of the Majority of the Commission Dismissing the Claim.

The memoralist in the above-entitled case claims from the Republic of Chile the sum of $27,500, with interest from January 13, 1881, for acts said to have been committed against his property by the military authorities of Chile during the war of 1879-81 between Chile and Peru.

It is alleged that on the 13th day of January, 1881, the memoralist, a citizen of the United States, but residing in the city of Lima, Peru, was the owner in his own right of a stock of jewelry, silverware, etc., in a store situated in the Plaza of the town of Chorillos, Department of Lima, Peru; that *on said date*, after the battle of Chorillos and the taking of that town by the Chileans, his store was pillaged and burned by the Chilean forces.

The manner in which the claimant came into possession of this stock of jewelry, etc., is stated by him in the memorial as follows:

"The said store was first put up by the late Mr. August Bosse, a citizen of Peru, in the aforesaid town of Chorillos; business was carried on prosperously at this store *till the time that war broke out between Peru and Chile.* The consequences of this most unfortunate and unforeseen event, very soon after obliged the said Bosse, who had a large stock of trinkets and valuable jewels, to borrow some money that he might be able to cover honestly certain obligations he had previously contracted, on which account I decided to lend him the sum of three thousand pounds sterling, gold, same proved by accompanying deed. Unfortunately there was a depressure in all branches of business, and more so in those that were not of prime necessity, such as jewels, trinkets, watches, etc., and there *being at the same time the probability of a future invasion by the Chilean forces,* I decided, *in guard of my interests,* to make up a second contract, by which contract *I became sole proprietor of the said establishment and of the entire stock,* species and furniture, because said Mr. Bosse, being my debtor for the amount of three thousand five hundred pounds, was not able to pay me the said amount in cash. All this is most evident by the accompanying deed, dated twenty-third of December, of one thousand eight hundred and eighty.

It appears, therefore, that this property of a belligerent was covered with a neutral character only 21 days before the battle of Chorillos, under circumstances of considerable suspicion. Without dwelling, however, upon the sincerity or the legality of this transaction, we pass to the main facts of the case.

According to the statements of the claimant himself, the acts complained of occurred on *January 13th.* This is repeated half a dozen times in his memorial and in his statement to the United States Minister. In his brief, counsel states that the claim is for a total loss of the stock in the jewelry store "which was forcibly entered *on the 13th day*

of January, 1881." Of the three witnesses who testified (in *ex parte* depositions) on behalf of the claimant, the first states that the store and all jewelry, etc., therein was burned and destroyed "on the thirteenth of January and the fourteenth"; the second, that they were burned on the 14th of January; and the third, that he did not remember the day. Neither the claimant nor any of the witnesses testify that they actually witnessed these alleged acts against the claimant's property, nor do they state the hour of the day when such acts occurred.

It is alleged by the claimant in his letter to the United States Minister in Peru that the acts occurred "while the Chilean forces were *in quiet possession of the town*, and all necessity of hostilities had ceased"; that his premises were "forcibly entered by a body or squad of Chilean soldiers, in uniform and in command of their officers." In his memorial he states that at the time of the acts "the town of Chorillos was in the undisputed possession of the Chilean army of invasion; no battle was pending, nor was there any reason for the seizure which, if not commanded by the Chilean military authorities, might have been prevented by them." Further on he states that "the Chilean commanders had to look at all that happened, impotently; *that they could do nothing to stop or prevent the fury of the soldiers*, inebriated by their victory in the battle of San Juan."

The claimant, however, was not in Chorillos when these somewhat contradictory occurrences took place. Consequently we have from him only bare statements and no evidence concerning the alleged pillaging of his store. *Nor do any of the witnesses in the case testify a single word concerning such pillaging.* The most they can say is that the store was *burned* by the Chilean forces.

There being, then, no evidence whatever to support the allegations of pillaging, and that point being eliminated from the case, the only question now to be determined is whether the claimant's store in Chorillos was burned on January 13,

1881, by Chilean soldiers in a manner contrary to the rules of civilized warfare.

The battle of Chorillos, fought on January 13, and that of Miraflores, fought on January 15, were the two decisive battles of the war between Chile and Peru, and practically ended the hostilities.

Official documents, the reports of the chiefs of staff of both the Peruvian and Chilean armies, and especially the careful account published by the military attaché of a neutral government (*all of whom were eye-witnesses of the occurrences*) give an essentially different story from the meagre and contradictory evidence of the claimant's witnesses, and from certain reports and letters, no matter how respectable the writers, made wholly on hearsay.

From all the reliable evidence it results that on the 13th of January, 1881, Chorillos was the field of a long and bloody engagement between the armies of the belligerents. It was necessary for the Chileans to take the town by storm, fighting from street to street, and from house to house. Every window was filled with Peruvian soldiers, and the attacking troops were met by hailstorms of bullets. In the midst of the fight, hand grenades which had been sown in the streets set fire to the town, and the flames spread rapidly, enveloping both armies in smoke. The fire, which could not be controlled, gradually gained possession of the whole town and continued to burn for several days, till the destruction of Chorillos was complete.

Perhaps the best qualified testimony concerning this battle is that of M. Le Léon, a French military attaché, who afterwards embodied his observations in a pamphlet entitled "Souvenirs d'une Mission à l'Armée Chilienne." As to his opportunities for observation, M. Le Léon says:

"We accompanied, step by step, the General-in-Chief during the battle of Chorillos. * * * Unhampered by any preoccupation as to the different phases of the battle, we were able to study them coolly, and to note each incident

and its precise hour. On horseback, in the staff of General Baquedana, we were well placed to know the movements of the troops. Besides, after the battle, we went over the ground and discussed the deeds done with some of the principal actors." (Pp. 8, 9.)

M. Le Léon's account of the taking of the town and the burning of Chorillos on January 13th, is as follows:

"In the meanwhile a bloody battle was going on on both sides in Chorillos. The Peruvians make a continuous fire from the tops and windows of the houses. The Chileans break down the doors, penetrate into the houses with drawn bayonets, or set fire thereto. Nobody asks quarter, such is the heat of the struggle. The progress of the attack is at times arrested. The advance is from street to street, from house to house. *More than one group prefers to perish amid the flames*, notwithstanding the offers made by the commander of the *Esmeralda*. The defenders of one house went so far as to kill a Peruvian officer who was a prisoner, and who had been sent to ask them to surrender. *But assailed on all sides by the flames* and the bullets, the Peruvians could not continue their resistance.

"Towards the end of the fight a train coming from Miraflores with troops and guns ready primed had to retreat under the fire of the Chilean batteries.

"The struggle sustained in Chorillos was fatal to that beautiful city despite the efforts of the General-in-Chief, who took up his quarters in the fine residence of an ex-President of Peru, situated in the finest part of the city. Some cavalry patrols endeavor to drive from the city the many scattered soldiers who had appeared after the victory, but unsuccessfully.

"*The fire, which nobody could control, spread rapidly among the lighter and drier buildings. From the top of the general headquarters we see the flames urged by the sea breeze advancing like waves bent upon the destruction of our quarters;* it is known that stores of cartridges and shells are in the neighborhood. There is no time for hesitation. At 8.30 P. M. we mount, despite the fatigue which overcomes us, and we follow the General-in Chief in search of another asylum outside the city.

"It is an awful sight, which remains deeply engraved on the memory of all those who witnessed it. *The houses wrapt in flames, fall with tremendous noise*, lighting up heaps of charred bodies.

"At intervals bullets fired at random by wandering soldiers are heard whistling over the staff.

"All night long shots are heard. The scattered cartridges in the houses explode; shells burst *amid the smouldering ruins*, as if a new battle were going on.

"*Three days later the fire was still devouring the last group of houses.* There barely remain two or three isolated fine residences. One of these, owned by a Frenchman, was saved after constant efforts and thanks to the friendly assistance of the Chilean officers."

Léon: "Souvenirs d'une Mission a l'Armée Chilienne" (pp. 67, 69, 70.)

The reports of the chiefs of staff *of both the Peruvian and the Chilean armies* concerning the taking of Chorillos on Janury 13th, are in evidence, and both of these generals concur in the fact that the town was set on fire during the battle.

General Silva, chief of the Peruvian staff, reports as follows:

"LIMA, *January* 28, 1881.

"Mr. SECRETARY:

* * * * * * *

"The absolute necessity of my attending first to the defence of the line in the points already mentioned, and next to the reconcentration and the reorganization of the scattered troops, render it impossible for me to report to you the heroic resistance which the first corps of the army, under command of the valiant and resolute Colonel Miguel Iglesias, *made in the town Chorillos, which, it may be truthfully said, was surrounded by a circle of fire.*

"Nevertheless, I should state to you that the forces of the second army corps, not yet disorganized, which had been ordered to march on Chorillos, and assist in the tenacious resistance there being made, having been called on by His Excellency the Chief Magistrate, the Zepita battalion No.

29, entered through Lima street, led by the daring Colonel Isaac Recabarren, and, although attacked at various points, it fought with decision until it was completely destroyed. It was supported by the Ancachs battalion No. 25, which also experienced, as well as the Jauja No. 23, great losses, both without having succeeded in dislodging the invaders.

"Colonel Suarez withdrew, but as he still preserved the Concepcion battalion organized and intact, I ordered him to attempt another assault on Chorillos with it and with the remnants of the Jauja battalion and other bodies. He did so and was again repulsed. In this situation and seeing himself attacked by hostile forces in several directions, he fell back on Barranco.

"*The disaster was complete at* 4.30 *P. M.*

* * * * * * *

"PEDRO SILVA."

General Maturana, chief of the Chilean staff, reports as follows:

"CHIEF OF THE GENERAL STAFF.

"LIMA, *February* 9, 1881.

"THE GENERAL-IN CHIEF:

* * * * * * *

"While the fight on the heights was taking place, a no less stubborn one on both sides was going on in the town (Chorillos). Infantry forces of the several divisions, under command of their respective officers, and artillery, attacked the Peruvian troops, intrenched within the town, which made a lively fire from the terraces of the houses and from their doors and windows. This fight in the street was obstinate and without quarter, which the combatants on either side neither gave nor asked. Our fearless and invincible infantry had to enter by the streets, where at each step they were received by hailstorms of bullets coming from different points, which they immediately attacked with ball and bayonet to the extent of exterminating the obstinate squads of the enemy. In the midst of the heat of the fight, *the grenades of our artillery set fire to the town, and the fire spread rapidly, enveloping the defenders of the place in a whirlwind of smoke and flame.*

"Many died, thus reduced to ashes amid the ruins of the

buildings; and the rest, pursued from block to block, and from house to house, were put to death by the bayonets of our infantry. Some of the enemy's troops, which arrived at the last moment on a train from Miraflores, having protected cars armed with cannon, which kept up a heavy fire, had to also flee precipitously on finding the place taken, and on receiving the discharges of our artillery and infantry.

"At 2 P. M. the battle had entirely ended, the town being strewn with bodies, on the streets as well as within the houses, the whole affording a picture of blood and horror, *blackened by the smoke, and illuminated at intervals by the sinister and ruddy light of the conflagration.*

* * * * * * *

"MARCOS MATURANA, JR."

General Baquedana, the General-in-Chief of the Chilean Army, in his report to the Secretary of War, says:

"The resistance in Chorillos was fatal to it, because it brought therewith the burning which destroyed it almost completely."

Such are the facts concerning the burning of Chorillos, as given by the highest official authorities on both sides, and by an unbiased neutral military expert, *all of them eye-witnesses of the occurrences.* Under such circumstances it is fair to presume that the claimant's store was burned in the fire (which lasted two or three days and destroyed nearly the whole town) incident to the battle, unless clear and explicit evidence is adduced to the contrary.

Such contrary evidence on the part of the memorialist is, as already stated, meagre and unsatisfactory. *The whole testimony of the claimant's witnesses (only three in number) in regard to the facts is comprised in their answers to the same question in the deposition of each.* This question is as follows:

"Say whether it is true that said store, with all the jewels therein, watches, shelves, utensils, as also furniture and articles of private use, which were in the adjoining house to

the said store, of jewels and watches, were burnt and destroyed on the thirteenth of January and the fourteenth, 1881, by the Chilean forces, long after the battle of San Juan had ended, and after their being in tranquil possession of the said town of Chorillos."

To this question the first witness, D. Massabo, replied:

"That it is most true and has evidence of it *because* on the day that the fire took place the witness was locked up by the Chileans as a prisoner at the barracks in the said town of Chorillos, whereof the Chileans were the only occupants."

The second witness, C. Gignoux, replied:

"That this question is equally true in all its parts and most evident, *because* none of the houses situated on the main plaza of Chorillos was burnt on the thirteenth of January, but on the fourteenth of January, 1881, and that his own house, said Hotel Pedro, was also burnt down on the fourteenth of January, 1881."

The third witness, J. Scott, replied:

"That this question is likewise most true in all its parts, and that it is evident to him, *because* that fire was known by all to have taken place, and by it were burnt his store as well as that of the said Bosse and all others on the same day or thereabouts; *he could not ascertain the day; he did not remember.*"

Such is the extent of the claimant's evidence. It will be noted that not one of the witnesses testifies that he actually witnessed the burning of the claimant's property.

To supplement this testimony much stress is laid in the claimant's brief upon the reports and letters of Mr. Christiancy, the U. S. Minister in Peru, to the U. S. Secretary of State, wherein the former forcibly condemned many acts of the Chilean troops during the war, and stated, among other

things, that Chorillos was wantonly and unnecessarily burned two or three days after the fighting and resistance had ceased.

Mr. Christiancy, however, although a strong Peruvian sympathizer, was too straightforward and honest a man not to be the first to admit that he had no personal knowledge whatever of these alleged acts, and that *all his statements in this regard were obtained on hearsay.* It may be said that there is hardly a single averment in his reports not prefaced by such words as "from all that I could learn," "from all reports," "as I am informed," etc., etc., and such phrases as:

"I state what I am on all hands informed is the fact, though I do not personally know."

"In making these statements I do not profess to speak upon my own knowledge, but upon the best information I can obtain, which, I hope for the honor of humanity, may turn out to be untrue."

Mr. Christiancy's sources of information were, of course, entirely Peruvian.

The report of Lieut. Houston, U. S. Navy, attached to the Peruvian staff, is also cited by the claimant. Lieut. Houston, however, *was not present at the battle of Chorillos, but obtained the information from others.* He says:

"From Col. Iglesias and other sources, intelligence was received of the atrocities committed by the Chileans in Chorillos."

Nevertheless, Lieutenant Houston confirms the statements of the eye-witnesses to the effect that the town was set on fire before the battle was over. According to all the authorities cited by both sides, the battle was practically over some time between the hours of two and four-thirty P. M. Lieutenant Houston says:

"At one thirty P. M. the previous day (Jan. 13) they had set the town on fire. The fire *continued burning* during

Thursday, Friday, and Saturday, destroying nearly the whole of it." (P. 49.)

He adds that later in the day (13th) some of the Chilean troops being intoxicated, began firing on each other and became ungovernable.

The claimant also cited the report of Lieut. Com. Mullen who states that:

"After Chorillos and its defences were captured, firing still continued, and I ascertained that it was between Chilean troops who had gotten under influence of liquor. *Measures, I believe, were taken to stop this proceeding*, but from the time the battle ended till next morning it was dangerous and unsafe to go inside the limits of Chorillos."

From the above evidence, which is practically all that is adduced by the memorialist in support of his contentions, it can hardly be said that he has overcome the presumption that his property was burned *in the fire incident to the battle.*

Even assuming, however, that the destruction of this property was not owing to military operations, no evidence has been presented to show that it was destroyed by soldiers in the presence of or authorized by their officers or in the presence of officers who could have restrained them but did not make the necessary effort to do so; nor is there anything to prove wanton destruction or neglect on the part of the authorities in command, or that the loss was occasioned by the intention or default of Chilean officers.

Under such circumstances, by the well settled principles of international law, there can be no recovery.

"Neutral property in a belligerent's territory shares the fate of war the same as of subjects or citizens. If injured or destroyed in battle or siege, in the absence of circumstances evincing wantonness or culpable neglect on the part of the government within whose jurisdiction it is, the public law furnishes the owner no redress against such government.

The case is not altered if the owner happens to be an officer of a neutral power." (Moore, 3710.)

See also Wilson's case, before the United States and Spanish Commission, 1881. (Moore, 3674–3675.)

"However severe may have been the claimant's injuries it must be recollected that like injuries are committed in most cases where towns are sacked, and that aliens resident in such towns are subject to the same losses as are citizens. It has never been held, however, that aliens have for such injuries a claim on the belligerent on whom they are inflicted. On the contrary, the authorities lay down the general principle that neutral property in belligerent territory shares the same liabilities of property belonging to the subjects of the State."

Mr. Bayard, Secy. of State, to Mr. O'Connor, Oct. 29, 1885.

Wharton, Int'l Law Dig., Sec. 223, p. 581.

See also, Calvo Droit Int., Sec. 1748.

Finally, it was claimed by the memorialist that the Republic of Chile had settled the claims of citizens of other nations who were residents of Chorillos on January 13, 1881, by allowing a lump sum which was distributed *pro rata*, and that thereby it acknowledged its liability for acts similar to that now claimed by Bacigalupi in this case. There is nothing in any of the settlements mentioned to show that damages were paid for injuries sustained at Chorillos, but only generally for injuries growing out of acts committed during the war of 1879–1881. It is also clear, on reference to the protocols, that Chile made stipulations that these treaties or arrangements were not to be understood as affecting directly or indirectly the principles of jurisprudence maintained by the Chilean Government; and Moore, referring to the protocol by which it was agreed that the claims of Italian subjects against Chile, growing out of the war of 1879–1881, should be submitted to a tribunal of arbitration, says:

"No award was made by the tribunal for the destruction of property at Miraflores or Chorillos, during or just after the battle of those places."

From all the evidence in the case, and from the rules of international law as applied to it, it results, then, that this case must be dismissed.

J. B. PIODA,
President.
C. MORLA VICUÑA,
Commissioner for Chile.

Dissenting Opinion of Mr. Commissioner Gage.

In the foregoing case I dissent from the opinion of my honorable colleagues for the reasons given below.

The evidence in this case shows that the claimant had a stock of jewelry destroyed at Chorillos, Peru, after the battle between the Chilean and Peruvian forces at that place.

This battle in and around Chorillos was fought on the 13th of January, 1881, and the commander-in-chief of the Chilean army, General Baquedana, states that their victory was complete at 2 P. M. on that day.

The claimant contends that his property was destroyed by fire on the 14th of January, when the Chileans were in undisputed possession of the village.

The questions to be determined are:

1st. Whether the property was destroyed by the Chileans.

2d. If so, was it destroyed under such circumstances as should make the Republic of Chile responsible for the loss?

To substantiate his claim the memorialist has produced the declaration of three witnesses made in the most solemn form before a court of the Republic of Peru.

The printed record indicates that the second question asked of the several witnesses, upon which they gave their declarations, was "whether the store *with its contents* was burned and destroyed on the 13th of January and the 14th by the Chilean forces *long after the battle* of San Juan (Chorillos) had ended, and after the Chilean forces were in tranquil possession of the town of Chorillos."

On the oral argument of the case it was pointed out by the Honorable Agent for the United States, and assented to by the Honorable Agent for Chile, that the words, "on the 13th of January," were not in the original, but had crept into the record through some mistake of the translator. It thus appears that the only inquiry of the witnesses was as

to what transpired on the 14th of January. The answers of the witnesses, which are quoted in the opinion of the majority of the Commission, seem to show conclusively that the property was destroyed on the 14th. It further seems to me that there is no warrant for saying that they were not eye-witnesses to the occurrence. They testify positively in reference to it.

The circumstances which each witness gives in connection with his statement are evidently mentioned for the purpose of indicating that they are positive as to the date and not for any other purpose. For instance, there is nothing to show that the witness Massabo intended to say that he was locked up by the Chileans as a prisoner at the barracks before the burning of his property, but the natural inference is that he was locked up after this occurrence. The witness Gignoux clearly fixes the date, because his own house was burned on the same day; and while the witness Scott states that he cannot fix the day, the only conclusion to be drawn from his answer to the question, when the question is considered, is that it was after the battle of San Juan had ended and after the Chilean forces were in complete and peaceful possession of the town of Chorillos.

It is contended that the positive evidence of these witnesses, *who gave their testimony under the sanctity of an oath*, is to be entirely ignored and is to be discredited because of the statements and reports of certain Chilean military officers and the highly colored statements of the French officer, M. Léon, who was on the staff of the Chilean General, Baquedana. One has but to read the statements of this officer to discover its utter unreliability, and that he was merely making an attempt at fine writing.

The same remark will apply to the report of the chief of the Chilean General of Staff, Maturana. For instance, this officer states that at 2 P. M. "the battle had entirely ended, the town being strewn with bodies in the streets as well as within the houses, the whole affording a picture of blood

and horror, blackened by the smoke and illuminated at intervals by the *sinister* and *ruddy* light of the conflagration." Who but General Maturana ever heard of the "sinister and ruddy light" of a conflagration at 2 P. M. in the afternoon?

Lieutenant N. T. Houston, of the United States Navy, who was on the ground, states that the town of Chorillos was set on fire by the Chilean forces, and that it continued burning during *Thursday, Friday, and Saturday*, destroying nearly the whole of it.

Lieutenant Commander Mullen, of the United States Navy, who accompanied General Maturana, states, in his report, that "owing to the rapid advance of the Chilean army the artillery was not called into requisition"; so that the claim that the village was set on fire by the artillery of the Chileans, which was made by this same General Maturana, is evidently incorrect according to the statement of an impartial observer.

The property of the claimant having been burned on the 14th, when the evidence clearly shows that the whole army of General Baquedana was quartered in and about Chorillos, it is evident that it occurred at a time when, if any effort had been made by the Chilean officers to protect the property of neutrals in the place, it might have been done.

It is the rule that neutral property must share the fortunes of war in the same manner as that of citizens of the country which is the theatre of war.

But, in the war in question, the dean of the Diplomatic Corps in Chile had received assurances from Chile that, in this campaign, "the General-in-Chief will take special care in harmonizing the important interests of neutrals with those corresponding to Chile as a belligerent."

And it was therefore agreed that "in order to have neutral persons and their interests easily certified to, the former will hold a certificate of the legation of which he is a citizen or subject, and the latter will have besides the flag of its nation a placard authorized by the seal and signature of the legation, fixed in a visible place on the property."

See the letter of Mr. Valderrama to the French Minister to Chile, dated October 5, 1880.

The claimant's property had upon it the certificate and flag indicating that it belonged to a citizen of the United States.

Notwithstanding this agreement to take special care to guard the interests of neutrals, there is no indication that neutral property, as such, received any protection whatever from the military officers of Chile in the campaign in question. It certainly nowhere fared better than that of the Peruvians, so far as appears from the evidence or from the history of the period.

The true reason for the destruction of the claimant's property and other property in Chorillos seems to be given by the commander-in-chief of the Chilean forces himself, when he says in his official report, "At 2 P. M. the town and the Morro were in our possession. The resistance in Chorillos was fatal to it, because it brought therewith the burning, which destroyed it almost completely."

It is evident that no attempt was made by the commander-in-chief to restrain his forces. From the day of the landing of the Chilean troops many towns in Peru which came into their possession were sacked and destroyed. No town of importance except Lima was exempt. It is also to be borne in mind that the Chilean Admiral, Riveros, had ordered the destruction of Chorillos, with Ancon and Chancai, by the order dated September 21, 1880, which the Chilean fleet attempted to carry out by bombarding those places on the 22d of September, 1880.

That Chorillos was burned purposely or by the gross negligence of the Chilean officers, is further evidenced by the fact that the houses were separated and constructed of non-inflammable material, so that they could not be set on fire readily by shells, even when the attempt was made to do so at the time of the above bombardment. The report of the commander of the squadron to his Government, dated San-

tiago, October 6, 1880, stated that "the *Cochrane* was instructed to set Chorillos on fire, which it proposed to accomplish on the 22d of September, and by cannonading that town from the middle of the day to 4 P. M. *The material of the houses and the fact of their being surrounded by gardens prevented their being set on fire.* The number of shells discharged over Chorillos were 84."

It further appears that General Baquedana threatened to burn Lima if it came into his possession after a battle, which clearly shows that he considered such a course entirely legitimate. He was only prevented from doing this, as is established by the evidence in this case, by the unanimous protest of the foreign ministers resident in Lima, who, at an interview held with him, stated that it was entirely contrary to the rules of civilized warfare, and that the property in the city was largely the property of neutrals (which was also true of Chorillos), and by finally intimating to the General that if he carried out his threat the foreign navies would take possession of the fleet of Chile; whereupon he gave assurances to the ministers that Lima should not be burned and that he would protect the property in the city. This he did do, notwithstanding that the battle of Miraflores occurred subsequent to that interview. The fact that he was enabled to control his troops at Lima as he did, after the battle of Miraflores, is further evidence that if any attempt had been made to control them at Chorillos by the officers of the Chilean army, the destruction of that town, with a very large amount of neutral property in it, would not have occurred.

There are seven strong reasons for concluding that the burning of Chorillos after the battle, and especially such portions of it as were burned on the 14th, 15th, and 16th, which includes the property of the claimant, was done by the express order or connivance of the Chilean officers.

1. The burning was not done in the heat of battle but the next day, and when the commander had sufficient forces to prevent the destruction of the city.

2. The situation of the houses as heretofore pointed out was such that each house must be fired separately.

3. The evidence shows that the destruction was continued for several days. (See Lieutenant Houston's report and statements of the French attaché.)

4. The General-in-Chief of the Chilean forces says in his report that Chorillos, "*as a consequence of its resistance, was destroyed and burned.*"

5. Chorillos was one of the towns selected by the Chilean authorities for destruction, because of the sinking of their gunboat *Covadonga*. (See respondent's brief, Moore Case, pp. 1 and 2.)

6. Its fate was the very fate which several other towns had suffered from the forces commanded by this same General Baquedana, and which he threatened Lima with if it fell into his hands.

7. When this general reached Lima he was able to control his troops and maintain perfect order, and according to all reports their conduct at the latter city was excellent.

It seems to me satisfactorily proven, in view of the foregoing facts, that the property of the claimant was destroyed in the store on the square of Chorillos by the Chilean forces after they were in complete and peaceful control of the village and when their officers were present in the town, and could and should have prevented the destruction of the property of the claimant and others situated in that village. For such negligence the Chilean Government is responsible.

In the case of Terry & Angus against Mexico, decided by the United States Commissioners, the following facts appeared: The claimant's property was situated in Puebla.

Colonel Childs, of the United States Army, was in command of troops which were besieged in a part of the city by command of General Rea, a Mexican officer. It also appeared that a soldier of Mexico demanded the keys of the premises which were sacked and destroyed, and said that he did so by General Rea's order. The soldiers were two days

destroying the houses and property in the city. The Commission said that "in the absence of any direct evidence on the points *the length of time consumed in destroying the property, the publicity with which it was done, and the fact that the work of destruction was accomplished by soldiers of his command, lead irresistibly to the conclusion that, if not done by his direct order, it was at least done with the knowledge and acquiescence of General Rea.*" (Moore, Int. Arb., pp. 2293–4.)

In the case of Jennaud, decided by the Commission under the Convention between the United States and France, it was said that "the evidence shows that the burning was a wanton act of the soldiers in the excitement of the moment, as they were marching back to their camp from a successful battle with the Confederates. It was without any justifiable excuse, *in violation of order and discipline*, and committed when marching back to camp, under the command and in the presence of their officers, who, *by the usual and ordinary enforcement of military discipline*, might and could and should have prevented it, but who do not appear to have used any means whatever to prevent it. In such a case we think an allowance should be made." (Moore, p. 3001.)

The former Commission said in the Shrigley case, p. 140 of the decisions:

"*b.* Neutral property destroyed or taken by soldiers of a belligerent with authorization or in presence of their officers or commanders, gives a right to compensation, whenever the fact *can be proved that said officers or commanders had the means of preventing the outrage and did not make the necessary efforts to prevent it.*"

The respondent cannot be excused by saying that the commanding officers could not control their soldiers. If an undisciplined mob is let loose on a community, it may be the misfortune of the government which brings them together, arms them, and gives them the power and opportunity to prey upon unarmed and inoffensive neutrals. But it does

not excuse that government nor relieve it from responsibility for such acts of pillage and destruction. It will not do to say that because an act of pillage was done by soldiers not in the immediate presence of their officers, that there is no responsibility therefor on the part of the government. Such a rule would release a government from all responsibility for the acts of its soldiers. The officers, in order to relieve the government from responsibility for such acts, would simply have to step out of sight and let the troops pillage and burn with impunity.

Secretary Bayard laid down the rule in a communication to Mr. Buck, in Chile, dated October 27, 1885, as follows:

"The position of this Government is, that while a government is responsible for the misconduct of its soldiers when in the field or when acting *either actually or constructively* under its authority, even though such misconduct had been forbidden by it, it is not responsible for collateral misconduct of individual soldiers dictated by private malice. *But the mere fact that soldiers, duly enlisted and uniformed as such*, commit acts 'without orders from their superiors in command,' does not relieve their government from liability for such acts."

In view of the foregoing facts and authorities, it seems clear that the respondent Government is liable for the losses suffered by the claimant in this case, and an award, therefore, should be made in his favor.

WM. G. GAGE,
Commissioner on the part of the United States.

Attest:
JOHN F. BAKER,
ENRIQUE BALMACEDA,
Secretaries.

Delivered May 11, 1901.

United States and Chilean Claims Commission

DECISION No. 14.

ANDREW MOSS *v.* REPUBLIC OF CHILE.	No. 25.

Award of Commissioners.

In the above-entitled matter the sum of six thousand dollars in United States gold coin is awarded in favor of the claimant, which sum shall be paid by the respondent Government to the Government of the United States in accordance with the terms of the Convention under which this award is made.

J. B. PIODA,
President.
C. MORLA VICUÑA,
Commissioner for Chile.

While I concur in making the award in this case, I am of the opinion that under the evidence filed the claimant is entitled to recover a larger amount.

WM. G. GAGE,
Commissioner for the United States.

Attest:
JOHN F. BAKER,
ELIODORO INFANTE,
Secretaries.

Delivered June 8, 1901.

United States and Chilean Claims Commission

DECISION No. 15.

JAMES M. HALLOWES *v.* REPUBLIC OF CHILE.	*No.* 37.

Award of Commissioners.

In the above-entitled matter the sum of nine thousand dollars in United States gold coin is awarded in favor of the claimant, which sum shall be paid by the respondent Government to the Government of the United States in accordance with the terms of the Convention under which this award is made.

J. B. PIODA,
President.
C. MORLA VICUÑA,
Commissioner for Chile.

While I concur in making the award in this case, I am of the opinion that, under the evidence filed, the claimant is entitled to recover a larger amount.

WM. G. GAGE,
Commissioner for the United States.

Attest:
JOHN F. BAKER,
ELIODORO INFANTE,
Secretaries.

Delivered June 8, 1901.

United States and Chilean Claims Commission.

DECISION No. 16.

MICHAEL O'BRIEN AND JAMES H. KIMBALL *v.* REPUBLIC OF CHILE.	No. 12.

Award of Commissioners.

In the above-entitled matter the sum of four thousand dollars in United States gold coin is awarded in favor of the claimant, which sum shall be paid by the respondent Government to the Government of the United States in accordance with the terms of the Convention under which this award is made.

J. B. PIODA,
President.

WM. G. GAGE,
Commissioner for the United States.

C. MORLA VICUÑA,
Commissioner for Chile.

Attest:

JOHN F. BAKER,
ELIODORO INFANTE,
Secretaries.

Delivered June 8, 1901.

United States and Chilean Claims Commission

DECISION No. 17.

JULIA L. WILLIAMS, ADMINISTRATRIX, *v.* REPUBLIC OF CHILE.	*No.* 33.

Decision of the Commission Dismissing Case.

In the above-entitled case, it appearing to the Commission that the evidence submitted by the claimant therein is not sufficient to establish any liability against the respondent Government for the injuries complained of, the claim is hereby dismissed.

J. B. PIODA,
President.
WILLIAM G. GAGE,
Commissioner for the United States.
C. MORLA VICUÑA,
Commissioner for Chile.

Attest:
JOHN F. BAKER.
ELIODORO INFANTE,
Secretaries.

Delivered June 6, 1901.

United States and Chilean Claims Commission.

DECISION No. 18.

FRANK A. ROBINSON, Trustee, *v.* REPUBLIC OF CHILE.	*No.* 33.

Decision of the Commission Dismissing Case.

In the above-entitled case, it appearing to the Commission that the evidence submitted by the claimant therein is not sufficient to establish any liability against the respondent Government for the injuries complained of, the claim is hereby dismissed.

J. B. PIODA,
President.
WILLIAM G. GAGE,
Commissioner for the United States.
C. MORLA VICUÑA,
Commissioner for Chile.

Attest:
John F. Baker,
Eliodoro Infante,
Secretaries.

Delivered June 8, 1901.

United States and Chilean Claims Commission.

DECISION NO. 19.

KATE E. LEACH ET AL. *v.* THE REPUBLIC OF CHILE.	*No.* 8.

This claim is brought to recover indemnity for damages suffered by reason of the alleged "expropriation by Chile of the North American brig *Townsend Jones*, in Valparaiso harbor, in April, 1859." The memorialists are the personal representatives of James Murphy, owner of the brig and cargo, and the amount claimed, according to their brief, is the estimated value of the cargo ($100,300), and that of the brig ($6,895), in all $107,195, with interest on said sum at 7 per cent. from April 15, 1859. According to their memorial they claim damages in the sum of $150,000, with interest thereon from the same date.

The facts of the case, as briefly as possible, appear to be as follows:

In January, 1858, the brig *Townsend Jones*, 196 tons, of New York, owned by James Murphy, and commanded by Joseph Janvrin, master, cleared from the port of New York and sailed for Valparaiso, Chile, and a market. Her cargo consisted of shot, shell, guns, small arms and ammunition,

of the invoice value of $75,188. The owner "armed his said master with a full power of attorney" to sell both brig and cargo, and also gave him written instructions for his guidance. The brig arrived in the harbor of Valparaiso on the 27th day of April, 1858. Although the *Townsend Jones* had cleared for Valparaiso "and other ports on the Pacific ocean," and although the captain had been instructed in case he was unable to sell, and as soon as he had satisfied himself of this fact, "to proceed to some other port or ports on the Pacific," nevertheless, the ship did not proceed farther in search of a market, but, for reasons best known to her master and owner, lay in said harbor *for one whole year*, until some time in April, 1859, when the occurrences hereinafter described took place.

The second election of Manuel Montt to the Presidency of Chile in 1856 had been followed in 1858 by a feeling of intense dissatisfaction on the part of the liberals. Party strife had run high, and during that year had reached the point of organized sedition. A revolution was expected daily. The year 1859 ushered in a period of active rebellion, and during the months of February, March, and April, it was greatly feared that the outbreak might extend to Valparaiso. Some apprehension was felt by the authorities lest the *Townsend Jones*, the floating arsenal which had been lying in the harbor for a year, should fall into the hands of the insurgents or should supply them surreptitiously with muniments of war. During February and March, the Chilean officials made three examinations of the cargo on board the ship. Until that time, as is admitted by the claimants in their brief, "the government's supervision of the *Townsend Jones* had been such only as the peculiar nature of her wares warranted; the authorities were clearly justified in placing such guards as to make impossible the clandestine landing of arms."

Such was the situation on April 14, 1859. On that date the following order signed by the chief officer of the coast guard, was sent to Capt. Janvrin:

"APRIL 14, 1859.

"It having been charged that from the North American brig *Townsend Jones, there has been secretly taken a part of the cargo of arms it has on board*, the Honorable Intendente of the Province, *under date of the 9th inst.*, has ordered that *an extraordinary inspection* be made of said vessel, in order that, by making a careful comparison between the cargo existing on board and that set forth in the manifest, the truth in this matter may be arrived at; and in order to prevent any unfortunate accident it is ordered at the same time that the powder and inflammable muniments of war on board the said vessel shall be transferred in the shortest possible time to the public warehouses intended for this object.

"In consequence of the foregoing let a commission be appointed, composed of the employees, Don Nicolas Martinez, Don Cosme Jose Villalon, and Don Jose Rojas, in order that, observing all the precautions that the case demands it may proceed to carry out the comparison and transfer of the powder and muniments aforesaid. To this end the said vessel will be moored to the barge of Mr. Janssen, which has been leased to facilitate the operation.

"The expense that may be incurred, as well as the result of the said operation, will be opportunely reported.

"MONTIEL."

Captain Janvrin, after hearing this order read, went immediately to the Intendencia, made an oral protest, and showed the Intendente a letter wherein his employer directed him to sail at once for San Diego, California, as a contract had been made to sell the cargo to the Republic of Mexico. The Intendente, however, insisted that his orders must be carried out. The captain then went to the office of the Consul of the United States. The latter, at Captain Janvrin's request, wrote at once to the Intendente stating that the captain had received orders to sail immediately and was on the eve of asking for a clearance, and concluding by a request for a delay of four days in order that he might communicate the facts to the United States Minister at Santiago.

To this letter the Intendente replied that "formal and

private charges have been laid that there have secretly been unloaded from the *Townsend Jones* some of the arms that it had on board," and consequently "that an extraordinary inspection had been ordered." Nevertheless, he granted the request of a delay for four days, but notified the consul that, to prevent all fear of a secret unloading, the anchorage of the brig must be shifted.

On the following day, April 15th, the brig was towed to the inner haven and moored to a hulk about a hundred feet from the mole.

On April 19th, a written demand by the consignees in Valparaiso, Enrique and Daniel Lopez, was made upon the Intendente of the port for a clearance. This was refused upon the report of the chief officer of customs that the inspection ought to be carried out "otherwise we would thrust aside the provisions of the custom regulations in force touching such matters."

On the same date, the four days' delay having expired and no word having been received from the U. S. Consul touching the communication with the U. S. Minister, the Intendente issued an order for the inspection. Part of this order is as follows:

"It behooves that said inspection should be made in as few days as possible, and with all necessary energy, to bring which about you will instruct the Commission as to the provisions touching the case.

"As the brig has powder on board, it is important that the transfer of the barrels containing this combustible shall be made to the proper magazines to-morrow at a very early hour with all the necessary precautions. For this purpose you will use the boats that may be necessary."

On the following day, April 20th, the U. S. Consul, on behalf of Capt. Janvrin, made another written protest against the inspection as ordered, notifying the Intendente that his Government would be held responsible should such unloading take place. He added that the captain did not offer

objections to an examination on board the brig. The Intendente replied that as the Minister of Foreign Relations had ordered him to proceed in the manner indicated, he lacked authority to enter into a discussion regarding the matter, and advised the Consul, if the latter judged there were grounds for interposing claims, to lay them before the U. S. Minister.

On April 21 the Chilean officials proceeded to the unloading of the cargo, which was conveyed to a hulk moored in the harbor about twenty yards from the brig. On the 25th, *when the process of unloading was about half done*, the captain presented a written protest against the removal of any of the cases unopened. Thereupon a few of the cases were opened and their contents found correct. The removal of the powder, cartridges, etc., proceeded slowly, owing to the nature of the goods, and it was not until April 29 that the work was practically ended. About noon of that day the cases which still remained in the hold were inspected, and it appeared that all the cargo called for by the ship's manifest was complete.

Later, *on the same day*, Capt. Janvrin was notified by the custom officials that the work of re-stowing the cargo would proceed at once. The captain then asked for a written acknowledgment or certificate to the effect that none of the cargo was found missing. This being withheld on the ground that the powder in the kegs had not been examined by the committee appointed to superintend the discharge, the captain refused to permit any of the packages to be re-stowed.

On the following day, April 30, the officials again gave notice that they were prepared to replace the cargo. Thereupon, according to the complainant's brief, "the captain reiterated his demand for a receipt stating that the cargo had been found to be all right. A deadlock resulted, seeing which Ybanez ordered his laborers to leave. Thereafter, at half past three, Janvrin delivered to the resident guard in charge of the vessel on behalf of Chile, the following written notice of abandonment."

In this formal notice of abandonment *not the slightest mention whatever is made of this receipt* (or certificate that no part of the cargo was missing) upon which so much stress is laid in the claimant's brief. The notice simply states that whereas, in spite of his repeated protests, "forcible possession was taken of the brig by officers of the custom house," and the property under his charge forcibly removed, and whereas "it is now fully established that no portion whatsoever of the cargo has been clandestinely removed," therefore, "I, Joseph Janvrin, master of the brig *Townsend Jones* of New York, do hereby formally surrender and abandon said brig, her tackle and apparel, the cargo thereof and everything thereunto appertaining unto the Government of the Republic of Chile." He also gives notice that he will place his claim before the United States Government, demanding from the Government of Chile full and entire reimbursements for all losses, damages, etc.

It is interesting to note that Captain Janvrin asked for advice from the U. S. Consul concerning the proposed abandonment of the brig. The Consul referred the matter to the Hon. John Bigler, U. S. Minister to Chile, who, in a letter written thereafter to the Secretary of Foreign Relations of Chile, states as follows:

"The undersigned, upon the occasion above referred to, stated that when the brig *Townsend Jones* was about being abandoned by her captain on the 30th of April, 1859, the Consul of the United States for the port of Valparaiso, *acting under instructions from this legation*, declined giving official advice in the premises and informed the captain thereof that if he abandoned the said vessel he must do so upon his own responsibility."

A few days after the abandonment, the Intendente again notified Captain Janvrin, and the U. S. Consul as well, that the reloading of the brig was about to take place. The Consul replied that owing to the notice of abandonment, the vessel was no longer in his jurisdiction. The captain wrote

refusing to be present, "he not desiring to take possession of said cargo and vessel which he abandoned for the reason already expressed to the Government of Chile."

On several occasions during the early part of May, the Chilean officials notified both Captain Janvrin and the U. S. Consul to be present at the reloading of the brig and to take possession, adding that the Government—

"is not liable for the injuries and damages which the vessel, as well as its said cargo, might be exposed to through any cause, which damages, as well as the expenses of guarding and preserving the vessel, will be at the expense of the captain."

On May 19, the Intendente gave a final notice to the Consul that the stowing must be proceeded with at once, and, on May 25, the Consul was duly informed that "the North American brig, *Townsend Jones*, now has all her cargo on board and perfectly stowed." The Consul, in reply, stated that he had referred this communication to the U. S. Minister. Captain Janvrin again refused to take possession.

Some time after the cargo had been restowed, the brig being still in the guard of the custom-house officials, the consignees, Messrs. Enrique and Daniel Lopez, began suit against the owner of the vessel, duly represented by the curador de ausentes (public representative of absent defendants) to enforce the payment of a bill of exchange for $4,000 drawn by Captain Janvrin and secured by the ship and cargo, and protested for non-payment. Captain Janvrin had full authority thus to draw, having been instructed by the owner in January, 1858, that in case the actual necessary expenses should overrun the money in hand "before you have disposed of any of the cargo, and if you have no available funds to defray the same, you will draw upon me for the amount thereof at ten days' sight."

The suit begun by Messrs. Lopez went through the various legal stages, as appears by a certified copy of the proceed-

ings, and finally the ship and cargo were sold and adjudged in due form.

The principal point made in the claimant's brief is that "suspicion of illicit dealings with rebels was no sufficient ground for refusing clearance to the *Townsend Jones*, even if based on secret information."

In the first place, it will be observed that "illicit dealings with rebels" was not charged by the Intendente. Both Captain Janvrin and the Consul were notified that formal charges had been laid that certain arms had been secretly unloaded from the ship, and that in the exercise of the custom regulations an extraordinary inspection had been ordered. The regulations referred to authorized "special visits of merchant vessels on suspicion or information he (the Chief of Customs) may have that abuses against the exchequer are being carried on."

Although the result of the inspection did not disclose (at that time) a shortage in the cargo, yet the fact that the suspicion and information were reasonable and well founded is fully shown by the testimony which was elicted at an investigation which took place afterwards as a result of the instances of the Hon. John Bigler, U. S. Minister to Chile.

In that investigation, Capt. Janvrin himself, in an examination which took place according to law, swore (among other things) to the following:

"At the beginning of the year 1859 several persons who said they belonged to the party opposing the Government saw me on several occasions with the purpose of proposing to me the sale of the cargo of arms I had on board said brig. * * * In order to arrive at a fixed bargain, I was present at many meetings held by the rebels in this city and other places. * * * In consequence of those agreements, on the 11th day of February, I had one thousand muskets in readiness in the hatchway of the brig in order to deliver them. * * * Some launches would receive the rifles, and the steamer *M*[illegible], at the moment of coming to tow my brig, would deliver to me one hundred thousand

dollars, which Lopez said he had at his disposal to pay for my cargo, offering me three hundred thousand dollars in addition to that if the revolution should succeed. * * * The delivery of the muskets was to be accomplished by night, but in the twilight I met on the pier a brother of Mr. Lopez, and he told me to go back on board, because the authorities suspected our intentions. * * *

"On the day I prepared the rifles, Manterola sent some men in their launches to receive a quantity of cartridges, showing me an order containing nothing but a cross I had traced on the paper in order to evade suspicion. More than five hundred cartridges, which had been beforehand put into a sack, were delivered, such delivery having been carried out by the pilot through a seaman, because I was at the time on shore. On the 26th of February, one thousand cartridges more were delivered by virtue of a written order I gave to Manterola.

"Cotton paid me for the three thousand cartridges and for having prepared the arms four hundred dollars. * * *

"The sailor James Neale knows all or nearly all of what has been related, because he was present when the preparations were made, and he delivered the cartridges. Those three thousand cartridges were taken by two hundred from each box, and to prevent the diminution being noticed, a double bottom was put in the fifteen boxes which were not full. Said double bottoms yet exist."

Directly after these admissions by Capt. Janvrin, an investigation was made on the brig (which was still in the guard of the custom officials) by the criminal judge, the harbormaster and several other officials, and the boxes with double bottoms indicated by the captain were discovered and the shortage verified.

In the course of his examination Capt. Janvrin admitted that he had arrived at a final arrangement for the sale of his cargo to the revolutionists and had so informed the owner, Mr. Murphy, in a letter written April 15, 1859, the very day on which he had received notice that the extraordinary search had been ordered. The captain's letter copy book was produced, and it appeared that on said date he wrote Mr. Murphy, among other things, as follows:

"They proposed paying me ninety thousand dollars if I could clear the brig from the port of Valparaiso, the cash to be paid me as I got my clearance. On the 15th of this month I made application for my clearance; this was refused me, as an order had been issued to have the cargo discharged, a portion to be landed on the beach, the balance to be put on board a hulk now lying in the bay of Valparaiso. I immediately protested against the daring insult."

The seaman, James Neale, of the *Townsend Jones*, corroborated the captain's testimony in regard to his relations with the revolutionists, the preparation of the rifles for delivery, and the actual transfer of the cartridges. He also stated that he was present when double wooden bottoms were put in fifteen cartridge boxes in order to make them appear as if they were full.

A large number of witnesses testified in this investigation. Among others, Santiago Torrejon stated that at the direction of Mr. Manterola he went on two occasions on board the brig exhibiting a paper marked with a cross, and received each time a sack containing a large number of cartridges; that these cartridges were afterwards distributed to the revolutionists.

George Cotton, a citizen of the United States, testified as to the landing of the cartridges, for which he paid the captain four hundred dollars; also as to the proposed delivery of the muskets and the proposed sale of the cargo to the revolutionists.

Horacio Manterola described in full his negotiations with Janvrin for the sale of the cargo to the revolutionists for three hundred thousand dollars, if the revolution was successful; also concerning the delivery of the cartridges and the proposed delivery of the muskets prevented by the suspicions of the custom officials.

A dozen other witnesses testified in relation to the same and other matters.

Shortly after this investigation the Hon. John Bigler, U. S. Minister, in a letter to the Secretary of Foreign Relations of Chile, wrote as follows:

"On the 14th of June, 1859, a copy of the claim above alluded to, and copies of all the documents relating to the case of the *Townsend Jones* not previously forwarded, were transmitted by the undersigned to his Government, and instructions in relation thereto requested. After a careful examination of the facts of the case and the questions involved, *the Government of the United States*, as your Excellency is well aware, *twice, through this legation, advised the agents of the owner of the brig "Townsend Jones" and cargo*, which, on the 30th of April, 1859, by the late master of the said brig, were abandoned to your Excellency's Government, *to resume the control of the same*, and after having done so to prepare a claim for the amount of damages actually sustained in consequence of arbitrary or unreasonable acts which may have been committed by officials of your Excellency's Government, such claims to be accompanied with fair proofs as to its justice and reasonableness. * * *

Although the various and contradictory statements above alluded to as having been made by Joseph Janvrin, the late master of said vessel, have fully satisfied the undersigned that he is a reckless and unprincipled man, the confession of criminal acts committed by him on board of and as the master of said brig, which confession was voluntarily made before the judge of crime of Valparaiso, is in every part and respect so fully corroborated by statements sworn to by others, and by the report of the committee which, acting by order of one of the judicial tribunals of the said city, on the 9th and 10th of July last, examined the cargo of said vessel; that he has failed to discover grounds upon which to dispute or contest the truth of the statements made in said confession, and is, therefore, for his own part, *unable to perceive any grounds upon which a claim founded upon the case of the brig "Townsend Jones" can now be sustained against your Excellency's Government.*"

According to the complainant's brief, however, Mr. Bigler "had no judicial authority in the premises," and, in any event, he would have reached a different conclusion, it is

claimed, if he had read an article published in February, 1862, in a newspaper of Valparaiso, the "Mercurio," which declares that by virtue of a written order of the President of Chile and the Minister of Foreign Affairs a large sum of money was paid to Capt. Janvrin as "a reward accorded to him in order that he furnish data which prove that the said brig was in league with the revolutionists to furnish them arms, etc."

If such an order as the above was passed, the claimants had ample time to prove its existence before this tribunal in a manner consistent with the ordinary rules of evidence. Certainly newspaper articles are hardly the kind of evidence upon which an International Commission can base a decision.

In view of all the facts and circumstances of the case, as set out at length above, it is impossible to see how this Commission can come to any other conclusion than that reached by the Hon. John Bigler, namely, that it is unable to perceive any grounds upon which a claim founded upon the case of the brig *Townsend Jones* can be sustained against the Government of Chile.

There can be no doubt that a merchant vessel of one country visiting the ports of another for the purpose of trade, is, as long as she remains, subject to the laws which govern them. (92 U. S. Rep. 520.) In the present case, the custom regulations authorized "special visits of merchant vessels on suspicion or information that abuses against the exchequer are being carried on." As shown above, the suspicion or information was certainly well grounded. It is claimed on the part of the memorialists that the ship could have been examined without unloading the cargo, and two witnesses so stated under oath. On the other hand, the custom officials, on the day before the unloading, declared "that they could not examine the cargo upon the vessel's deck." In view of the large quantities of powder, cartridges, and inflammable munitions of war in the ship, this state-

ment seems plausible, and, in view of all the circumstances, it cannot be held that the officials were not authorized to make as complete an examination of the cargo as they did. If the captain thought otherwise, a claim against the Government of Chile could have been filed for such damages, if any, as were actually sustained. If, in the unloading, any part of the goods were injured, as is alleged, a protest filed, with due proof, would have been a valid basis for a claim. Such a course was suggested by the United States Minister when, after the abandonment, he advised the owner to resume control of the ship. The owner might also, if he had seen fit, have presented a claim for damages on account of the alleged detention, although, as a matter of fact, the ship was detained only eleven days—that is, from the refusal of a clearance (April 19) to the abandonment (April 30), and, if he felt he had been injured by his failure to get a receipt or acknowledgment that no part of the cargo was missing, the protest of the captain laid ample foundation for a reclamation. But nothing of this kind was ever claimed and no such damages were ever proved. The abandonment made against the advice of the United States Legation has alone been adhered to, and the claim before this Commission is, as stated in the brief, "for damages suffered by reason of the *expropriation* by Chile of the brig."

It is clear that there was no "expropriation." There was no "confiscation," as alleged, and all the cases cited by the complainants in their brief are not in point. In the case of the *Havana Packet* (Moore, 5036) the ship was confiscated and her master and crew imprisoned. In the case of the *Phare* (Moore, 4870) certain boxes of arms on a French ship at Corinto were confiscated by the Nicaraguan authorities, and the Cour de Cassation, chosen as arbitrator, awarded the value of the arms appropriated. All the other cases cited are in the same line, or are for personal damages for imprisonment, etc.

When Captain Janvrin abandoned the *Townsend Jones*

he did so on his own responsibility. The ship remained in the guard of the Chilean custom-house authorities until the suit was begun by the consignees against the owner and the vessel. As the ship was then removed to the jurisdiction of the court and sold and adjudged in due form in said suit, the Government of Chile can hardly be held responsible for the loss.

Upon all grounds this case must be dismissed.

J. B. PIODA,
President.

C. MORLA VICUÑA,
Commissioner for Chile.

Dissenting Opinion of Mr. Commissioner Gage.

The claim in this case is brought to recover indemnity for damages suffered by reason of the detention and expropriation in 1859 of the ship *Townsend Jones*, an American vessel, and her cargo, in Valparaiso harbor, by the authorities of Chile. The ship and cargo were owned by James Murphy. The claimants are his personal representatives. In 1858 she sailed from New York with a cargo of arms and ammunition consigned to Valparaiso. The invoice value of the cargo was $75,183; the value of the ship was $6,895. Her captain was one Joseph Janvrin. The entire defense is 1st, that 3,000 cartridges from the cargo had been secretly landed in violation of the customs laws of Chile.

2d. That the vessel *intended* to break, in some way not explained, the treasury regulations.

3d. That it was the Captain's *intention* to furnish, to certain revolutionists, munitions of war.

It appears by the deposition of the first and second mate, steward, and three seamen, made April 28, and the protest of Capt. Janvrin, made April 30, 1859, that the ship arrived in Valparaiso April, 1858, and from that time until the March 10, 1859, a continuous watch was kept on board of ship by the officers and crew, and that no portion of the cargo was or could have been clandestinely removed from on board thereof. On that day the port authorities of Valparaiso placed on board a custom-house officer as a permanent resident guard, after which a night watch was no longer kept up by the crew.

During all the months of February, March, and April, 1859, guard boats lay constantly near the brig day and night. On three occasions officials of the revenue service came on board of her and examined the cargo to see if any of it had

been removed; to wit, February 5, 20, and March 10, to which no objection was made by those in charge. On February 9, 1859, the owner, Murphy, made a sale of the cargo to the Mexican government, which was ratified on the 25th of May. The first mail in April brought letters to the captain from the owner, informing him of the sale of the cargo and directing him to proceed to San Diego, California, at once, that being the nearest port to Mexico. He was directed to touch at Acapulco on his way up, where he would receive further instructions.

On the 11th of April, 1859, Captain Janvrin applied to a shipping master at Valparaiso for three sailors to complete his complement of crew, and, on the 12th he went to call on chandlers of the same city, stated his purpose to sail for San Diego, California, at once, and that he desired to purchase supplies for the trip; and, on the 14th, he notified them to get the stores and provisions ready, as he would sail on the next day.

In 1858 there had been indications of a revolution against the existing Government of Chile, and, in the early part of 1859, for four months, an active revolution was carried on in the Northern Provinces, in which 5,000 men were killed. Gallo, a young leader commanding the liberal forces, occupied Copiapo, raised a small army, and defeated the Government forces in a battle at Los Loros, March 14, 1859, and thereupon occupied Coquimbo and La Serena. On the 29th of April, 1859, the last battle of this revolution was fought at La Serena, in which the insurgents were routed and dispersed.

The Government authorities of Chile, meanwhile realizing that this cargo of munitions of war would be of great value to these insurgents, and no doubt learning from the inquiries made as aforesaid, for supplies and men, by Captain Janvrin, that he intended to sail with the brig *Townsend* for San Diego, and fearing that these dangerous supplies might possibly fall into the hands of the insurgents in

the North, decided to find a pretext under which they could effectually prevent the supplies reaching those unfriendly hands and, if need be, allow them to use the same for the defense of the Government.

They decided, therefore, to seize the cargo on the ground that the captain and ship had violated the *customs* regulations of Chile by landing some of the cargo without permission from the customs authorities, and thereupon, under date of April 14, Montiel made the order which is set forth at length in the opinion of the majority of the Commission.

It will be observed that during nearly all the time that the revolution had been raging in the North, the Government had caused frequent examinations of the contents of this ship on the pretext of seeing that none of it was brought ashore without its permission; but, as the revolution became more threatening in the North, this order of Montiel was made so as to effectually prevent any possibility of these supplies falling into the hands of the insurgents.

On this same day, April 14, Captain Janvrin applied to the proper authorities in Valparaiso for a clearance, exhibiting the letters of instruction which he had received from the owner in confirmation of the purpose of his clearance and true destination. Although the captain made every effort to get a clearance, it was refused him on the pretext above set forth, and it was stated that not until an inspection could be made of the cargo would the ship be allowed to clear.

To this the captain duly protested, as also against the seizure of the property of Mr. Murphy. At the same time he filed a written protest with the Consulate of the United States, and the Consul of the United States also made a protest the same day against the extraordinary course pursued by the authorities of Valparaiso.

In reply to the communication of the Consul, the Intendente of the Province of Valparaiso answered on the same date, stating, among other things, that "formal and private charges have been made that there have secretly been

unloaded from the *Townsend Jones* some of the *arms* that it had on board, and therefore an extraordinary inspection had been ordered to take place *on the brig*. Therefore, there has not been, *and there is not the intention* to unload the vessel, but merely to run over the cargo, and, at the most, as the vessel is full, to transfer to a *barge* the part that may be necessary in order that the investigation may be careful. This done, the cargo will remain in the same state, without the captain going to any expense whatever."

The action was claimed to be taken under the provisions of the Chilean customs law, Sec. 2, Chap. 17, Art. 29, which reads as follows: "The chief of the custom officers will make special visits to the merchant vessels on suspicion or information he may have that *abuses against the exchequer* are being carried on, *only in such cases that he may not be able to ask the previous permission* of the chief of the revenue. The fact having been proved, he shall immediately inform the chief of the custom-house, who will determine the steps to be taken."

It will be observed that this provision had no application to the case.

The following day the ship was taken in tow by a Chilean steamer and moved to a berth within 100 yards of the mole. Further effort was made by the consignees, E. and D. Lopez, to obtain a clearance, but it was refused. Thereupon, the Chilean authorities proceeded to unload the greater portion of the cargo of the ship and transfer it to the Government warehouses on shore, *instead of to the hulk, as the Intendente had stated it would be done, thus placing it completely within the control of the Chilean authorities*, who took complete possession of it.

The captain insisted that the examination of the packages, as they were taken from the ship, should be thorough; "that each package, case, and box should be carefully and properly opened before leaving the vessel, in order that the contents thereof be proven to be in good condition, and that it might be received by the authorities as such."

It is true that this request was not made until the 25th of April, when a portion of the cargo had been removed, including the powder, but up to the time that this request was made not a single box of cartridges or case of rifles had been taken out of the ship.

This course was certainly proper and necessary, since the property was being removed from the possession and observation of the captain.

To this request the custom-house officer replied "that he declined to open or inspect such packages *on board the Townsend Jones;* that he, the said officer, had been for many years familiar with the handling of cargoes and was *perfectly satisfied* that *every package* contained its entire contents, as specified in the manifest, and that all said contents were in good order and condition ; *that as such he recieved them.*"

An occasional package was opened by the officer in charge, but nothing like a thorough examination was made on the ship.

This proceeding dragged along for many days, not more than three or four hours daily being occupied in the work. These facts appear not only from the protest of Captain Janvrin, but also by the report filed by Lieutenant Dawson Phenix, U. S. Navy, and George T. Stevenson, of the United States Consulate, who were appointed by the United States Consul to stand by during the proceedings and observe all that was done, their report appearing in full in the printed evidence. The completion of this examination was thus delayed until April 29, the very day of the last battle of the revolution, which resulted in a complete victory for the Government.

It appeared from the examination that the cargo was intact, and, in fact, there were three boxes of cartridges more than the bill of lading called for. The captain thereupon requested a receipt, stating that the cargo had been found to agree with the bill of lading. The notary, Ybañez, who attended the unloading, inquired " *whether if such receipt were*

given the captain would again receive the cargo." At four o'clock in the afternoon of that day, Ybañez reported on board that the Intendente sent word that "he would give the receipt that the cargo was all right *when he found it convenient*," and he again asked the captain to allow a restowage of the cargo, which the captain refused to consent to without the receipt being given, as requested.

The captain thereafter repeatedly requested a receipt, showing that the cargo had been found correct, which was always refused. On the 30th of April, when the authorities of Valparaiso refused to give any receipt, the captain abandoned the ship to the Chilean authorities and made a formal protest to that effect. On the 11th of May the Intendente of Valparaiso notified the United States Consul that the reloading of the ship was about to proceed. On May 19, the Intendente notified the United States Consul that there was 820 pounds 9 ounces of *powder* missing and an *excess* of three boxes of ball cartridges, and that as soon as the arrangement and storing of the cargo was concluded he would notify the Consul. So far as this alleged shortage in the powder is concerned, it is to be observed that prior to this time no pretence was made, that any information had been given to the authorities that any *powder* had been taken from the ship or that these packages were short. Nor was there any claim by the owner thereof that the packages of powder weighed any given amount The bill of lading showed 240 kegs of powder only.

On May 25 the Intendent of Valparaiso notified the United States Consul that "the American brig, *Townsend Jones*, now has all her cargo on board and perfectly stowed." The unloading and loading, therefore, had dragged along nearly a month and a half without any apparent good reason.

It lacked but four days of a month after the unloading was complete before the cargo was replaced.

It will be observed, by reference to the time when the revolution ceased in the North, that the goods were being

taken out of this ship at the very time when the most important events were occurring in the North, and that the goods were actually in the possession of the authorities of Chile on shore and under guard on the ship all that time.

Chile was thereby enabled to absolutely prevent this warlike material from falling into the hands of the insurgents, and it was not until long after the revolution in the North had been effectually suppressed that the goods were restored to the hold of the ship.

On the 13th day of June, 1859, the Consul of the United States notified Captain Janvrin that he had received notice on the 7th of that month from the Intendent of Valparaiso that the cargo of the brig *Townsend Jones* was now on the vessel and restowed, and requesting him (Janvrin) to inform the Consul at his earliest convenience of his wishes in relation to taking possession of the brig and cargo, to which Janvrin replied on that date:

"I beg leave to state that the mere fact of the replacement and restowage of the cargo of the brig *Townsend Jones* cannot, in my opinion, by any means justify me in again taking possession of the same, consistently with the duty I owe either to myself or to those whose interests I represent.

"I have repeatedly requested a certificate of the fact that the cargo of the vessel was found to be all right—a fact acknowledged by the officers who carried out the instructions of the local authorities in the examination and discharge of the said cargo, who assured me that such certificate would be given by the Intendente when he was ready. The withholding of such certificate is *still persisted in*, and I am still suffering under a false and unfounded accusation of criminal conduct, six weeks having elapsed since it was proven and acknowledged that such was utterly without foundation.

"Moreover, the cargo having been handled with carelessness in the discharge thereof, many of the *cases rudely broken open and exposed to the deteriorating influences of the atmosphere and its humidity*, I cannot, in any event, consent to receive and acknowledge such cargo to be in *good order* and *condition as it was at the time of its unlawful seizure.*

"I beg leave to state that I am informed upon the *very best authority* that a portion, and a very important portion, of the said cargo *is not on board* and has not been since the morning of the 21st day of April last past."

That the cargo was all intact when taken out of the ship by the authorities of Chile is proved by the evidence of Lieutenant Phenix and Mr. Stevenson, above referred to, in which it is positively stated that the lists of the packages inspected in, and those removed from the ship, which were kept, by the Chilean authorities, and by them, were compared, on the 29th of April, by both parties and found to agree exactly, and they also found that these lists corresponded with the invoice of the goods shipped at New York.

No proceedings were taken in any court of Chile against the ship for violation of its laws. Undoubtedly its authorities realized that after taking absolute possession of the property of Mr. Murphy, in the manner in which they had done, it was impossible, by any *legal* evidence, in the face of the constant request of the captain, in the presence of witnesses, for an examination of the cargo, as it was removed to show that there was any shortage *at the time it left the ship.*

During the entire season of 1859, from the 10th day of March, until September 30, and, in fact, indefinitely, so far as the Commission is advised, the Chilean authorities kept a guard on board of and retained possession of this ship and her cargo.

On September 30, 1859, as appears by a communication to Lewis Cass, Secretary of State of the United States, John Bigler, Minister at Valparaiso, reported that "*by order of the Chilean authorities, the brig 'Thomas ad Jones'* was *draped in mourning, her yards crossed, and every act and thing done on board of her which was ordered and required to be done on a vessel indisputably the property of the Chilean Government.*" Which conclusively proves that Chile, without taking any action in any court, had taken absolute possession and claimed title to this brig.

The owner of the ship *Townsend Jones* had a perfect right to trade in the arms and ammunition which was on board her. It has been too often decided that trade in such articles is legitimate to have the point disputed now. At the time when she went to Valparaiso there was no war and no revolution, and while the Chilean authorities might, if they had seen fit, have ordered her out of the harbor on account of the goods which she carried, still, unless she violated the laws of Chile the authorities of the Republic had no right to seize her and her cargo. There is not one line in this case which shows that the captain, much less the *owner* of the *Jones* had violated any law of Chile. Not a single statute has been cited by the respondent Government which authorized it to seize this property and take it upon shore.

That the seizure was an absolute appropriation of the property, for the purpose of preventing it from falling into the hands of the revolutionists, is apparent when we recall the fact that three other examinations of the cargo had been made, without difficulty, on board ship, and Lieut. Phenix and Mr. Stevenson state that it could have been *as well examined on board* as to have been shipped to the shore. In view of the fact that the larger portion of the cargo was taken ashore unexamined, and seriously damaged by careless handling, and the refusal of the authorities to give any statement to the captain as to the result of the examination, there seemed to have been nothing else for him to do on the 30th day of April, 1859, but to formally abandon the whole to Chile, and to insist upon it until he was furnished a statement showing in what condition it was when seized by Chile and removed from the ship. If he had taken it on board and sailed with it, and it had been discovered afterwards that the packages had been broken open and tampered with, it would have been useless for the owner to protest that it had been appropriated by the officials of Chile, who had it in their absolute possession and control for some three weeks.

The following quotation from the very short brief of the

respondent Government is the key to the entire defense made here against this claim:

"The measures taken by the custom-house officers of Valparaiso and by the Intendente of the province were *for the purpose of* PREVENTING *the secret disembarkation* of the arms and munitions of war which constituted the cargo of the *Townsend Jones*.

"The Chilean authorities were authorized, in accordance with law, to make such inspection whenever, from reasonable suspicion or from information, it was believed that the vessel INTENDED *to break the Treasury regulations*. (Article 39, Chap. 17, Sec. 2, of the Custom-House Regulations of Chile, in force in 1859.)

"The acts which the captain of the *Townsend Jones* succeeded in executing, and those which he *intended* to execute, *amounted* to a violation of the custom-house regulations. More than this, it was his *intention* to furnish, and as a matter of fact there were furnished, to the revolutionists abundant arms and war supplies of all kinds to enable them to overthrow the Government."

I have quoted (*supra*) the provision of the Chilean Code, and there is not a word in it which authorizes the seizure of the ship or its cargo on *suspicion of an intention* to evade the revenue laws. Moreover, as already pointed out, it has no application in any way. It is apparent from the above quotation from its brief that respondent admits, that the *real purpose* and object of the seizure was to *prevent* the munitions and arms falling into the hands of the insurgents, and because it was claimed that Janvrin *intended* to deliver them to the insurgents, but, as we again insist, no law has been pointed out which would authorize the seizure and appropriation of the property in the manner it was seized and appropriated on any such ground. If this be a defense the burden of proving it, by a *preponderance* of evidence, rests upon the respondent. This entire line of defense is built upon the statements of this Captain Janvrin, which were made more than a year after he had abandoned the

ship and cargo to Chile. For these statements, he appears to have received $6,500 from the respondent Government. His statement amounts to this merely, that in February, 1859, he had delivered from the cargo 3,000 cartridges, and had later made a bargin to sell the entire cargo, to people who were about to rise against the authorities of Chile.

This statement of Janvrin is supplemented by statements of other parties who are shown to be as utterly unworthy of belief as he. The only witness who confirms his statement that any cartridges from the ship were put in the hands of the people plotting against the Government of Chile, is one George Cotton, who at the time he made his affidavit was confined in the state's prison. All of these statements are entirely *ex parte*, and except as to one or two persons whose statements have no direct bearing, they are direct contradictions of the former testimony of these same persons. In the statement made by Janvrin, just alluded to, which was dated the 21st of May, 1860, he says, among other things: "I admit freely that by my conduct I infringed the laws of Chile, but since the Government of the Republic has shown itself *so kind to me*, I am unwilling to commit a new wrong by concealing facts that have occurred which *will undoubtedly serve to justify its action*."

That this man is utterly unworthy of belief is proven:

1st. By the fact that, over and over again, under a solemn oath, he declared that no such thing had occurred while he was in command of the ship.

2d. No one can read the evidence produced before this Commission without being convinced that the "great kindness" which had been shown to him by the respondent Government was the payment to him of $6,500, that his statements might furnish *some excuse* for the utterly unjustifiable proceeding of the Chilean Government in seizing this ship and cargo.

At the 20th session of this Commission, held May 3, 1901, the Agent for the United States presented a petition,

accompanied by a memorandum received from and certified to by the United States Legation at Santiago, which, together with the exhibits thereto attached, reads as follows:

"*Memorandum:* In the General Archives of the Chilean Government, in the volume of decrees corresponding to the year 1860, appears at page 161, a petition signed by G. L. Hobson for the captain of the brig *Townsend Jones*, praying for the payment of the *reward* offered to said captain 'to furnish data proving that the brig *Townsend Jones was in league with the revolutionists to furnish them arms and munitions of war.*'

"Following the above petition is a decree dated July 10, 1860, copy of which is attached, marked 'Exhibit A.'

"In the general account of the Government for the year 1860 appears the expenditure of $6,500. Certified copy of which is attached, marked 'Exhibit B.'

"In the day book of the Treasurer-General of the Republic of Chile, for the year 1860, at page 16, appears the following payment, dated July 22d, to G. L. Hobson for the captain of the *Townsend Jones* for 'part of the reward granted for the purpose of furnishing data *tending* to prove *that the brig "Townsend Jones" was in league with the revolutionists* of Valparaiso to furnish them arms and munitions of war, $6,500.'"

Extract from Exhibit B (Item 8).

"Spent for the acquisition of data for diplomatic discussions, $6,500."

The Agent for the United States asked, in view of the foregoing, that the Commission ask, pursuant to Art. 3 of the Convention and Rule 10, by cable, that the Government of Chile furnish duly certified copies of the petition on which the above orders were made, together with the orders themselves. At the next session of the Commission, the following order was made by it:

"*Ordered:* That the application be denied, but that the motion of the Honorable Agent for the United States in the matter of said application, and the accompanying papers, be

filed in the case and be given such weight in the disposition thereof as they may be entitled to."

In view of the foregoing and of the fact that the Commission has constantly acted upon the uncertified printed documents, reports of military officers, etc., etc., introduced in favor of this respondent, and in view of the fact that it is not at all likely that claimant could ever have procured certified copies of the original petition, decree, and record above requested, I can see no ground for wholly ignoring this evidence that Janvrin received compensation for making his last statement which was in the interest of the respondent.

Again, Janvrin's protests and first statements, as well as those of all the other witnesses in connection with the affair, were a part of the *res gestæ* and admissible as evidence on that account. They were declarations made at the time. Their later statements are mere *ex parte* affidavits, without any opportunity of a cross-examination, and are utterly unreliable. It is thus seen that the respondent has utterly failed to establish this defense by a clear preponderance of proof. The facts still exist that this ship and cargo were seized and appropriated by the Chilean Government in such a manner that the only thing the captain could do was to abandon her under protest to the Chilean authorities, and they took and retained absolute possession of both ship and cargo.

I do not overlook the contention that the authorities of Chile examined the cargo of the *Townsend Jones* and found that certain cartridges had been taken out of some of the packages and the bottom of the package made double in order to have the package appear as though it were still filled with cartridges; nor the claim that the Chilean authorities had compared the cartridges in these boxes with some found concealed in Valparaiso at the time of the insurrection, and that some of them corresponded, in the

marks upon them, with those in the packages on the *Townsend Jones*. This evidence is, however of practically no value in the case.

1st. Because it appears from the evidence that this examination was not made until the 9th of July, 1860. The ship was then in the possession of the Chilean authorities, no one representing the owner having been on the ship or having had any custody of these packages from the time when the same was abandoned to the Chilean Government, April 30, 1859; so that it is apparent that there was abundant opportunity after that date to have put these boxes in the condition in which they were found, and no one would be able to determine when it was done.

2d. The idea that these people could identify cartridges and show that they belonged to a given lot and that they came out of a given box, in view of the commercial nature of cartridges and the fact that they are manufactured by the millions, all of the same kind and exactly alike as to quality, weight, packages, etc., etc., is too absurd to have any weight as evidence.

3d. Authorities that would give a "consolation" of $6,500, with a promise of a large amount more, to Captain Janvrin, for the purpose of obtaining evidence against the *Townsend Jones*, would not hesitate for a moment, when these cartridge boxes were in their possession, to make the changes necessary for the purpose of making evidence against the owners of this property.

4th. We have not one particle of evidence in this case that these cartridges were really absent from the boxes or that the bottoms of the boxes were doubled, except these *ex parte* statements of the Chilean authorities and their perjured witnesses, and we do find that there were three *boxes* more than the invoice called for. And we have no evidence at all that these boxes were in the same condition as when received by the Chilean authorities.

Great stress has been laid upon the statement made by

John Bigler, Minister of the United States to Chile, in which he undertook to say to the Minister of Foreign Relations for Chile that the circumstances of the case were such that he was unable to perceive any grounds upon which a claim founded upon the brig *Townsend Jones* could then be sustained agaist the Chilean Government.

This communication is dated Santiago, Chile, April 22, 1861. That statement certainly should not affect the merits of this case. Mr. Bigler had no authority to give such an opinion of the case. He could not bind the owner in any way. What he says was, that under the proofs as they stood then "that there is not, *at this date*, any claim founded upon the case of the *Townsend Jones*, *under the control of this legation*, or which the *undersigned is authorized* to press upon the consideration of your Excellency's Government."

So far as appears, there was nothing at that time in the case to show the conspiracy of the captain against his owner, and certainly there was nothing appearing to Mr. Bigler which showed the method which had been adopted in order to *induce* Janvrin to make his perjured statement, which was procured for the very purpose of preventing the United States Government from *pressing* this claim.

It appears, therefore, from the foregoing that the real purpose in seizing and transporting this ammunition to the shore and detaining it, as was done, was for the purpose of having the possession of the same to prevent it from falling into the hands of the insurgents during the struggle then in progress, and so that the Government, if need be, might use them for its own purposes. When the authorities found that it was not necessary to use them for the armament of the Government's forces, and when the crisis was over, then they at once sought to place them again in the hands of the owner, after his sale to Mexico had undoubtedly been lost.

The Chilean authorities continued to refuse to give any receipt showing the condition in which the cargo was when seized by them, and on September 30, 1859, they took for-

mal proceedings to show that the ship and cargo were held by the Government as its property absolutely.

If the Government of Chile seized this property for the purpose, as above indicated, of preventing it from falling into the possession of the insurgents, and I believe the evidence fully warrants that conclusion, then if the insurrection had continued for six months or a year longer they would not have restored it until the emergency had passed.

A seizure of property for such a purpose is always a *conversion* of it to the use of the Government, just as it would be if the property were seized by an individual for his own use.

No offer to return the property, after such conversion, will relieve it from paying the value thereof to the owner any more than it would relieve an individual under like circumstances from making full compensation.

If a government seizes property and *retains* it in its possession, then the failure to libel or to bring an action for condemnation and forfeiture for violation of its laws—if there be such violation makes such government, under international law, liable to the claimant whose property is thus seized and confiscated without warrant and without due process of law.

The Franklin, Moore, Dig. Int. Arb. 3783.
The Labuan, " " " " 3791.

The exigencies of war may justify the seizure and appropriation of private property of a neutral for the use of a belligerent, but it is only on condition of compensation for the loss.

Marks case, Moore, 3722.
Elliott case, " 3720.

If the ship and owner had violated any law, the ship and cargo could not be seized and detained *without trial* except

on condition of payment therefor by the respondent Government.

The Franklin (*supra.*)
The Labuan, Moore, 3791.
Consonno *v.* Persia, Moore, 5020.
The Phare, Moore, 4870 4873.

There cannot be a particle of doubt, from the proofs in this case, that Mr. Murphy was deprived of a very valuable property, and lost it by reason of the course pursued by the authorities of Chile in taking absolute possession of this ship and her cargo, which they afterwards confirmed on September 30, 1859, by taking every formal step which it was usual for the Chilean Government to take to assert its dominion and ownership over such property.

In view of all the facts in this case, these claimants are entitled to a most substantial award.

WM. G. GAGE,
Commissioner on the part of the United States.

Attest:
JOHN F. BAKER,
ELIODORO INFANTE,
Secretaries.

Delivered June 8, 1901.

United States and Chilean Claims Commission

DECISION No. 20.

CENTRAL AND SOUTH AMERICAN TELEGRAPH CO.

v.

THE REPUBLIC OF CHILE.

No. 1.

Award of Commissioners.

In the above-entitled case a majority of the Commission decides that the amount retained by the Chilean telegraph administration, based upon the decree of October 22, 1891, said amount representing the two-cent tax on messages retained by the said administration between October 22, 1891, and September 1, 1893, to the retention of which amount the company objects, should be repaid to the said company by the Government of Chile, together with interest on monthly balances, at six per cent., to April 9, 1894, the date when the former Commission expired by limitation, and the majority of the Commission therefore awards to the claimant said amounts, being the sum of three thousand seven hundred and eighty-two dollars and forty-three cents, United States gold coin, together with two hundred and seventy-nine dollars and eighty-six cents interest as aforesaid, which

sums shall be paid by the respondent Government to the Government of the United States, in accordance with the terms of the convention under which this award is made.

The amount retained by the Chilean telegraph administration after September 1, 1893 (the date to which the computation before the prior Commission was carried), is not embraced in the above award, and the interest is not allowed after April 9, 1894, because the majority of the Commission is of the opinion that the Commission is without jurisdiction so to do.

J. B. PIODA,
President, Commissioner for Switzerland.
WM. G. GAGE,
Commissioner for the United States.

Dissenting Opinion of Mr. Commissioner Vicuña.

The former Commission refused to render a decision with regard to item number 6 of claim No. 1, of the Central and South American Telegraph Company, because there was not sufficient evidence to convince it in a satisfactory manner of the validity of the said item.

The evidence brought before this Commission is nothing but a repetition of that before the first Commission, and as the actual Commission is not a court of appeal to the former one, this Commission has no power to reverse or revise a decision of the first Commission.

The Commission established under the terms of the Convention of May 24, 1897, has no jurisdiction to decide as to the constitutionality, legality, and validity of a supreme decree of the Government of Chile, as that of October 22, 1891.

For these reasons this claim should be dismissed for want of jurisdiction of the Commission, without prejudice to the claimant seeking his remedy with regard to item No. 6 of his claim of the Government of Chile or of the courts of Chile.

C. MORLA VICUÑA,
Commissioner for Chile.

Attest:
JOHN F. BAKER,
ELIODORO INFANTE,
Secretaries.

Delivered June 17, 1901.

United States and Chilean Claims Commission.

DECISION No. 21.

THE SOUTH AMERICAN STEAMSHIP COMPANY *v.* THE UNITED STATES.	*No.* 18.

Decision of the Majority of Commission Dismissing Claim.

The memorialist in the above-entitled case is a corporation organized under the laws of the Republic of Chile, and having its domicile and principal office in Valparaiso. The damages claimed, which amount to over $200,000, with interest thereon at 6 per cent. from November 10, 1891, are based upon the alleged "unlawful and unreasonable seizure and detention of the *Itata* for a long period by the authorized officers of the United States, the same having been contrary to public law and the laws of nations and the laws of the United States.

Before the previous Commission a demurrer was interposed on the part of the United States, the principal grounds being (1) that upon the face of the record the vessel, at the time of the seizure, was not in the possession of the claimant, but in the possession of the Provisional Government of

Chile, either in the exercise of eminent domain or under a provision of the charter of said company or by agreement with the company; that consequently the damages, if any, by reason of the detention, etc., must be a question between the claimant and the Republic of Chile, and that the Government of Chile alone was entitled to claim against the United States; (2) that there was probable cause for believing that the *Itata* was violating the neutrality laws when seized, and the case having been tried on its merits, the vessel discharged and returned to Chile, no right was left to the claimant to demand damages from the United States.

It is a fundamental rule of pleading that a demurrer lies only for defects appearing on the face of the pleading, and must be decided without evidence *aliunde*. A demurrer admits the allegations of the pleading. This demurrer, therefore, assumed the allegations of the memorial to be true, and the prior Commission, basing its decision upon these allegations, decided on the first point as follows:

"We only decide at present that the memorialist, as owner of the steamship *Itata*, is entitled to maintain its claim for any damages done to the vessel itself, *if such damage has been occasioned by any unjustifiable action of the United States.*"

And on the second point:

"*Assuming it to be true that after the departure of the 'Itata' from the port of San Diego she was pursued by the naval authorities of the United States upon the high seas into Chilean waters, induced to surrender by a display of superior force, and brought back under duress.* * * * (after an examination of the authorities . * * we are of opinion that the South American Steamship Company has a claim for extraordinary repairs of machinery and boilers made necessary by the long voyage to and from San Diego. We do not deem it necessary at this time to examine the other items of the damage claimed. If any single item in the list constitutes a valid claim for damages, the demurrer

cannot be sustained. We therefore decide that it should be overruled and the respondent required to answer."

Thus it appears that the prior Commission was of opinion that, upon the *facts as stated in the memorial*, the South American Steamship Company was entitled to maintain a claim for damages, *if* such damages were occasioned by any unjustifiable action of the United States, and that said company had such a claim, *assuming it to be true* that the *Itata* was pursued by the naval authorities of the United States upon the high seas into Chilean waters, induced to surrender by a display of superior force, and brought back under duress.

The respondent Government having thereupon filed a general denial to all the material allegations of the memorial, and the case being thus at issue, the memorialist is required to establish, by legal and sufficient evidence, to the satisfaction of the present Commission (which is a continuation of the prior Commission), the allegations of its memorial before it can become entitled to an award for damages.

These allegations which the claimant must prove may be summed up as follows:

I. The grounds assumed by the prior Commission to be true, namely, that the damage was occasioned by an unjustifiable action of the United States; that the *Itata* was pursued by the naval authorities of the United States upon the high seas into Chilean waters, induced to surrender by a display of superior force and brought back under duress. And if these grounds are fully sustained then,

II. As to the amount of damage—that the losses, etc., claimed were actually sustained.

III. The statement set out in the fourth paragraph of the memorial, namely:

"That no transfer has been made of this claim nor any part thereof, *nor has your memorialist received any money or other equivalent or indemnity in satisfaction or part satisfaction therefor*, and said claim has never been presented to

any of the courts of Chile or the United States, nor has your memorialist ever given aid or comfort to the enemies of the United States."

The evidence produced in the case on the above points appears to be as follows:

I.

At the opening of the year 1891 the Republic of Chile was at peace, both internally and with the United States, under the established and recognized government of which President Balmaceda was the head. On January 7 a civil war broke out, a party which called itself the "Congressional Party" endeavoring to overthrow the government. All the warships of the Chilean fleet, about half a dozen in number, at once declared for the insurgents or Congressionalists. At this time the Congressionalists were few in number, without political organization, and not a single foot of Chilean territory was under their control. In this condition of affairs, on January 14, the steamship *Itata*, an ordinary merchant vessel belonging to the claimant, came into the harbor of Valparaiso from one of her regular trips along the coast, bringing freight and passengers. The next day, while anchored at one of the company's buoys, she was boarded by an armed launch from the *Blanco Encalada*, taken possession of by force, and carried out of the harbor. The *Blanco Encalada* was a warship of the fleet which seven days before, when the civil war broke out, had declared for the insurgents.

Against this seizure both the captain and the owner (the claimant) protested vigorously, and the latter filed a formal protest in writing in Valparaiso denouncing the taking as an act of violence which the company had been unable to resist, and declaring "the persons who have ordered it and the ships who so executed it responsible for the damages that may accrue to the company for the deprivation of the use of said vessel."

The Congressional party afterwards declared that it had taken possession of the *Itata* under the laws of January 2, 1884, and February 1, 1888, by which the company bound itself to place at the disposal of the Government its vessels, with their crews, whenever the Government should require it, for certain remuneration prescribed, to wit, a monthly charter equal to 19 shillings for each ton of net cargo. Although, at the time of the taking of the *Itata* the Congressionalists were in no sense the Government, or any government, nevertheless, the Company, when the insurgents became more successful, acquiesced in the taking under said laws, and finally, after the complete success of the revolution, waived the tort and held the Government responsible under said laws, as will appear later on, for all damages sustained.

As soon as the *Itata* was taken possession of by the Congressional party, on January 15, she was refitted and equipped as a warship, put under command of one of the insurgent officers as a transport to convey troops, provisions, and munitions of war, and was also used as a blockade cruiser.

During the months of February and March the cause of the insurgents gained considerable ground, especially in the north of Chile, and in April the Provisional Government was well established at Iquique, its executive, legislative, and judicial branches being fully organized.

Early in April one Trumbull, an agent of the Congressional party in the United States, went to the city of New York and there bought from one of the mercantile firms dealing in such matters 5,000 rifles and 2,000,000 cartridges with the intention of sending them to the Congressional party in Chile for use in their effort to overthrow the Balmaceda government. Trumbull caused the arms to be shipped by rail to San Francisco. Arrangements had been made by him with the Junta by which they were to send a vessel to the United States to get the arms and munitions

and convey them to Chile. The *Itata* was dispatched for that purpose and was accompanied as far as Cape San Lucas by the *Esmeralda*, a warship in the service of the Congressional party. The *Itata* left Iquique on April 6, and at one of the Chilean ports on her way north took on board a number of soldiers with their arms. All these soldiers, as well as the rest of the officers and crew, were in the service of the Congressional party and its pay. At San Lucas Captain Palma of the *Esmeralda* took command of the *Itata*, and the captain of the latter was left there in command of the *Esmeralda*. The *Itata* then proceeded towards San Diego, really in command of Captain Palma, but ostensibly in command of another. Trumbull had given explicit instructions that the *Itata* should not enter the port of San Diego but should wait at some distance outside, in order that the arms and ammunition might be transshipped to her upon the high seas. The *Itata*, however, having *en route* furnished a large quantity of coal to the *Esmeralda* (which had been refused a supply in the Mexican ports) was forced to put into San Diego to obtain a fresh supply. Before coming into the waters of the United States, the *Itata* hauled down her jack and pennant; her cannon were removed from her deck and stowed in her hold; the arms of the soldiers and officers she carried, as well as their uniforms, were removed, and all appeared in civilian dress. Her commander gave orders that in case of any visit on board the soldiers should say that they were passengers.

On arriving at San Diego the *Itata* presented herself as an ordinary Chilean merchantman, flying the regular Chilean flag. She handed to the customs authorities a false manifest and a list showing her soldiers and officers, including Captain Palma as passengers, and also represented to the customs authorities that she was bound for British Columbia via San Francisco. She then proceeded to lay in stores of coal and provisions.

Meanwhile, Trumbull had chartered a schooner, called the

Robert and Minnie, in San Francisco, to take the arms, etc., from there to an agreed place of meeting, then expected to be near Sta. Catalina (an island off the coast, northwest of San Diego), where she was to join the *Itata* and deliver them on board, to be conveyed to Chile for the purposes already stated. The *Robert and Minnie* accordingly loaded at San Francisco and proceeded to the neighborhood of Sta. Catalina expecting to meet the *Itata* there. In the meantime the suspicions of some of the officers of the United States that the neutrality laws were being violated were aroused, and the marshal of the district was directed by the attorney general to detain the *Itata*. Acting under instruction from the United States District Attorney, as well as the Attorney General of the United States, George Gard, the United States marshal, on May 5, seized the vessel at San Diego, put a keeper or deputy named Spaulding in charge of her, and then went in search of the *Robert and Minnie*. Communication, however, had been established between the *Itata* and the schooner, and a point near San Clemente Island (off the coast, about opposite San Diego) had been fixed upon as a place of meeting for the purpose of transferring arms, etc., from the schooner to the ship. Accordingly the *Itata*, on the 6th day of May, without obtaining clearance papers, and against the protest of the deputy marshal, weighed anchor and steamed out of the harbor of San Diego, with the deputy on board, to meet the schooner.

As the ship left the harbor the cannon were hoisted out of the forehatch and fixed in the bow, some of the sailors appeared in uniform and armed with rifles, and the captain said to the deputy marshal: "See, we have now changed into a man-of-war." The latter kept protesting against the taking of the ship, and on attempting to leave the cabin to go on deck two armed Chileans at the door of the cabin prevented him. Shortly afterwards he was put off at Ballast Point, and the *Itata* then proceeded to sea. On May 8 the two ships met at the southeast anchorage of San Cle-

mente Island, in the same judicial district, and there the arms, etc., were taken from the schooner and transferred to the *Itata*, which started at once for Chile.

During the whole trip to San Diego and return the *Itata* was in the possession and control of the Provisional Government, and not in any way under the control of the South American Steamship Company. The president and secretary of said company afterwards made affidavits at Valparaiso to the effect that the vessel had been forcibly seized by the insurgents, and was at San Diego for arms without their knowledge and consent.

As soon as Mr. Tracy, the Secretary of the Navy, was informed of the fact that the *Itata* had dispossessed the United States marshal, he sent, on May 8, a cipher dispatch to Captain Remey, the commanding officer of the *Charleston*, at San Francisco, informing him of the fact that the *Itata* had been seized for suspected violation of neutrality laws and had broken away, and directing him to seize her if on high seas, while if found in foreign waters to watch her and telegraph the Department. The *Charleston* at once put to sea, cruised about after the *Itata*, but never came up with her, and did not, in fact, reach Iquique until the day after her arrival. When he put in at Panama *en route*, Captain Remey found a cable dated May 21, from the Secretary of the Navy revoking the order to seize the *Itata*.

Meanwhile, Secretary Tracy, on May 9, had also cabled Admiral Brown, on board the U. S. S. *San Francisco*, at Valparaiso. There were at that time three United States vessels stationed in Chilean waters, the *San Francisco*, the *Baltimore*, and the *Pensacola*. These vessels had been sent to Chile shortly after the outbreak of the rebellion at the request of the United States Minister to Chile, who had cabled Mr. Blaine that the revolted squadron was about to blockade Chilean ports, and asked that "some of our war vessels may be sent to these waters for the protection of the United States interests."

The above cable of May 9th to Admiral Brown notified him that the *Itata* had dispossessed the United States marshal who had seized her for violation of neutrality laws; that she was supposed to be equipped with cannon and a hundred armed men, and that she was expected to be sailing toward Chile with a cargo of arms. He was instructed to intercept the *Itata* and send her back to the United States. Admiral Brown, however, had already left Valparaiso, cruising north, and did not receive this cable.

He anchored at Iquique on May 10. In the roadstead were four insurgent warships and some armed transports, while the *San Francisco* was the only United States ship there—the *Baltimore* being in Valparaiso, and the *Pensacola* cruising along the coast. At this time Admiral Brown had received no information or instructions in regard to the *Itata*, and had never even heard of that vessel. A few minutes after his arrival an officer of the insurgent navy came on board to make the usual visit. As he was leaving he asked the Admiral if he had heard about the *Itata*. The latter replied, "No, I have heard nothing about the *Itata*. What is the *Itata*?" The officer informed him that it was one of their transports which had been to California and had left there, and that the account of it was in the morning paper. Ten minutes later the officer obtained the paper which contained an Associated Press despatch, dated Galveston, to the effect that the *Itata*, detained by the United States Government for taking aboard munitions of war, had left San Diego with the United States marshal on board and had landed him outside the harbor. *That was all there was in the dispatch.* On May 11, the admiral, accompanied by his staff and flag lieutenant, were received by President Montt, of the Provisional Government, who was an old friend of the Admiral, as well as by Señor Errazuriz, the Minister of Foreign Affairs, and a large number of prominent men. After being entertained by Señor Errazuriz they returned on board. The subject of the *Itata* was not referred to on that

day. On the evening of May 12th, Admiral Brown, while on shore for a walk, met Señor Errazuriz in the street. The Admiral, in the course of conversation, said that he would like very much to call on him unofficially and hear the history of the rebellion against Balmaceda and its cause from the beginning. Señor Errazuriz replied that he would be glad to give him the information, and it was arranged that the Admiral should call unofficially the next morning.

Soon after his return on board, in the evening of the 12th, a cipher despatch from the Navy Department was brought him by the consul. At about midnight the cipher was translated, its terms being practically similar to those of the cable sent to Valparaiso on May 9th, which was not received by Admiral Brown.

On the following morning the Admiral went ashore to keep his engagement with Señor Errazuriz. What occurred at that interview is stated by the Admiral in his deposition as follows:

"On the morning of the 13th of May I went ashore in citizen's clothes. I called at the office of Mr. Errazuriz and found him in. I told him I had come by his permission to hear his side of the story of the insurrection or uprising against the Balmaceda government. He gave me a very full account of it, which was very interesting and very instructive. When he had completed this and I had thanked him for it, and I had really risen from my seat to leave, I asked him if he knew anything more about the *Itata*. He said, 'Not a word since the Associated Press dispatch'; that they were extremely anxious to hear something, and turning then to me he said, 'Admiral, do you know anything more?' I said 'yes; I received a cablegram from the Navy Department yesterday evening which gave me very full information about her.' He said, 'I hope you can tell me something of that information, because the Junta, as he called them, the government, are extremely anxious, and I would like to be able to tell them something more.' I said, 'Well, Mr. Errazuriz, I can tell you that she left San Diego and dispossessed the marshal and landed him—

took him out of the harbor and landed him somewhere near Point Loma;' I suppose at the mouth of the harbor, and had gone to sea. 'Why,' he said, 'that is very strange.' I said, 'Yes; that is very strange.' He said, 'We regret very much that that has occurred.' I said, 'Yes; probably you do not understand the full situation as it existed there. My understanding is that she had been libelled by a United States court and placed in charge of an officer of that court and a deputy United States marshal, and that while so in charge of the court and under our laws she was practically the property of the United States Government during the litigation or what might follow, and that she had really run away from the custody of the United States Government.' 'Well,' he said, 'that may be very serious.' I said, 'I do not know just what may come out of it, but it is undoubtedly a violation of our revenue laws and of international law.' 'Well,' he said, 'I am extremely sorry to hear it, and if it were possible, and I think we may be able to catch her if she stops in any port with the *Esmeralda*, we would send her back—return her to San Diego, to the custody of the court immediately. Failing in that,' he said, 'we would disavow the act of her commanding officer, and would, when she came within our jurisdiction, return her to San Diego to the custody of the court.' I said, 'I am glad to hear you speak that way, Mr. Errazuriz, because it will undoubtedly relieve the situation very much and be very gratifying for the President to know this, that you are ready and willing to do as you say.' I said, 'I will, of course, communicate with the Navy Department on this subject, but before doing so I would like very much to have a letter from you covering the points you have stated orally.' 'Why,' he said, 'I will give you that with great pleasure.' I thanked him very much, and asked him when I could hear from him. He said 'immediately.' I went on board, and nothing came until that evening.

"Q. Now, please stop right there, sir. During this interview did you exhibit to him or state to him, otherwise than you have already explained, the contents of the message which you had received from Secretary Tracy?

"A. Nothing; I did not quote it in any way. I merely said that I had got full information about the '*Itata*,' *but I said nothing about any instructions or what the cablegram contained other than it gave me certain information.*

"Q. Please state whether or not you made any demands of any kind or any requests concerning the return of the *Itata*.

"A. I made no demands and no requests, and I said nothing about the return of the *Itata*. The only request I made was that he should write me a letter covering the points he had stated as to the willingness to return the *Itata*.

"Q. As I understand you, this visit was in citizen's clothes and entirely unofficial?

"A. I was in citizen's clothes. It was entirely unofficial and informal. It was purely personal."

On the evening of the 13th Señor Errazuriz sent to Admiral Brown the following communication:

"IQUIQUE, *May* 13.

"*The Provisional Government has learned by the telegram of the Associated Press* that the transport *Itata*, detained at San Diego, Cal., by order of the United States Government, for taking aboard munitions of war, and being in custody of the United States marshal, left port carrying that officer, who was landed at a point upon the coast and continued the voyage. The Government has ascertained nothing respecting any act of the *Itata* since San Diego. If the news be correct, *this Government would deplore the conduct of the 'Itata,' and as evidence that it is not disposed to support or acknowledge an infraction of the United States laws the subscriber takes advantage of the personal relation you have been good enough to maintain with him since your arrival to declare to you that as soon as the 'Itata' is within reach of orders this Government will place her, with munitions of war taken aboard at San Diego, at the disposition of the United States, through the worthy agency of yourself, in order that the United States laws, interrupted at San Diego, may fall on their course.*

"I have the honor to subscribe myself the Chilean Minister of Foreign Affairs.

"ISIDORO ERRAZURIZ."

The above communication was cabled by Admiral Brown to the Secretary of the Navy *verbatim*, and not in the code, so

as to be certain of its being fully understood. The admiral added in cipher:

"IQUIQUE, *May*, 14, 1891.

"Inclosed is a translation of a letter received, coming voluntarily after a personal interview with the writer, most trustworthy, and that all given pledges will be kept. Letter in accordance with the views of the President, Cabinet, Congressional Representatives at Iquique of the Provisional Government."

Admiral Brown never intimated to Señor Errazuriz or to any one connected with the Provisional Government the contents of the cable of May 12 from Mr. Tracy. He also testifies, referring to the expression, "I did not open the subject," in the above cable, that he meant he did not open the subject relative to her return, and had merely asked Señor Errazuriz if he had any further information.

On May 16 Admiral McCann arrived at Iquique on the *Baltimore*. Admiral Brown called on board the ship immediately, communicated to him verbally everything that had been done up to that time, and showed him copies of all the correspondence. Admiral McCann expressed a doubt as to whether the letter of Señor Errazuriz covered the return of the arms taken on board the *Itata*. Thereupon Admiral Brown saw Señor Errazuriz at once, telling him there was a possibility of his letter being misunderstood as to this question. The latter replied: "Not at all. We intended that to convey to you that everything she received on board in California in the way of munitions of war should be returned." To make the matter more clear, he wrote Admiral Brown, on May 17, the following letter:

IQUIQUE, *May* 17, 1891.

"ESTEEMED SIR: I would wish you to understand my letter of the 13th instant as declaring to you that it was the proposition of the Council of Government to return to the authorities of the United States the *Itata* with the arms and

munitions of war received in San Diego from (through the means of) the schooner *Robert and Minnie*.

"(Signed) I. ERRAZURIZ,

"*The Secretary of Foreign Relations,*

"*of the Provisional Council.*"

Up to this time Admiral McCann had neither called upon nor communicated with any member of the Provisional Government. His first call was on May 19, and the matter of the return of the *Itata* was not mentioned.

Mr. Tracy was much gratified to hear from the Admiral's cable that "those for whom the *Itata* acted disapprove of her conduct," and that she would be placed at the disposition of the United States as soon as she appeared. On May 16 he cabled Admiral Brown revoking the order to pursue and seize the *Itata on the high seas*, and on May 18 the Admiral replied stating: "I shall consider revoked the order to chase and seize the vessel."

Meanwhile no one knew where the *Itata* was. The Provisional Government on May 20 cabled the captain of the *Esmeralda* at Acapulco, Mexico, directing him to "*make restitution of the 'Itata' to the authorities at San Diego with the arms taken on board from the schooner*," but as the President of Mexico had ordered the telegraph companies to refuse messages to or from the *Esmeralda* the cable was not delivered. On June 3 the *Itata* suddenly appeared at Tocopilla (not having touched at any port after leaving San Diego), and was ordered by Senor Errazuriz to come at once to Iquique, where she arrived late in the night of June 3d. Early the next morning President Montt sent an aide on board the *Baltimore* to say that the *Itata* was placed at the disposition of Admiral McCann.

After the communication of May 17 (quoted above) from Senor Errazuriz to Admiral Brown, the subject of the return of the *Itata* was not again mentioned between the Provisional Government and the admirals, nor were any demands made by the latter for her return. In his deposition Admiral Brown states as follows:

"Q. Were any demands or threats of any kind with reference to the return of the *Itata* made to your knowledge?

"A. To my knowledge there were never any demands or threats made by either Admiral McCann or myself. We had agreed to say no more on the subject to the authorities, but just to await events.

"Q. Were you relying on them to carry out the promise which they had voluntarily made?

"A. I had perfect confidence that they would carry out their promise. I never doubted for one moment but that was their intention.

"Q. Do you recall, Admiral, whether during any of your conversations with Señor Errazuriz anything was said concerning the fact that the *Charleston* and other vessels had been ordered in pursuit of the *Itata*?

"A. I am quite sure I never did, because I never conversed with Mr. Errazuriz about the *Itata* after his second letter assuring me that the arms would be returned with the ship. I avoided doing so purposely."

After the *Itata* had been placed at the disposition of Admiral McCann, as above stated, the latter called on Señor Errazuriz to learn if orders had been given to prepare the ship for sea. During that interview Señor Errazuriz, referring to the munitions on the *Itata*, stated that the agreement of May 13 was to return the arms shipped at San Diego, and that those on board the *Itata* were transshipped on the high seas. *Señor Errazuriz made no objection to the return of the vessel on this ground*, but only to the return of the arms. He also cabled (June 5) Secretary Blaine concerning this point. In that cable, among other things, he says:

"*Complying with my written promise*, said steamer, along with the arms, has been placed under the charge of Rear Admiral McCann."

Admiral McCann showed Señor Errazuriz conclusively that the transshipment did not take place on the high seas, but at the southeast anchorage of San Clemente, in the ter-

ritory of the United States, and in the same judicial district as San Diego. Thereupon Señor Errazuriz replied that he had nothing further to say, and that orders would be given at once to Captain Tejeda, of the *Itata*, to prepare the ship for sea.

The necessary preparations having been made, the *Itata* left Iquique on June 6 for San Diego, in command of her captain, Tejeda, and with her own crew, and convoyed by the *Charleston*, which had been ordered from Panama to Iquique for that purpose.

On July 4 the *Itata* arrived at San Diego, and on July 8 the United States marshal resumed possession.

From all the above documents and facts it becomes plain that on May 13, seven days after the *Itata* left San Diego, Señor Errazuriz, on behalf of the Provisional Government, declared in writing that deploring the conduct of that ship they would place her, as soon as she came within reach of orders, at the disposition of the United States "through the worthy agency" of Admiral Brown. This letter explicitly bases this action on the fact that

"The Provisional Government has learned *by the telegram of the Associated Press* that the transport *Itata*, detained at San Diego by order of the United States for taking aboard munitions of war, and being in the custody of the United States marshal, left port carrying that officer, who was landed at a point upon the coast, and continued the voyage."

Admiral Brown, who saw the above telegram, which was published in the papers, states that the above was "*all there was in that dispatch.*" On the morning of the 13th, when the Admiral called upon Señor Errazuriz, the former asked him if he knew anything more about the *Itata*. Señor Errazuriz replied, "*Not a word since the Associated Press dispatch.*" The admiral said nothing whatever about the instructions he had received from the Department, but simply discussed

the case in the light of the statements appearing in this Associated Press dispatch.

Under such circumstances it seems impossible to controvert the fact that the information derived from this dispatch was, as Señor Errazuriz explicitly states, the basis and the reason for the promise of the return of the *Itata*. Furthermore, if this were not so, or if Señor Errazuriz had been misled by anything said by Admiral Brown in the interview of May 13, the former would certainly have been produced as a witness.

It was argued in behalf of the claimant that this promise of the return of the ship was made under pressure or duress; that the *Charleston* was in pursuit with orders to seize her; that demands and threats were made, and, therefore, the Provisional Government was forced to yield. In the first place the Provisional Government had no knowledge at that time of the orders of the *Charleston* to pursue. The instructions sent to Captain Remey by Secretary Tracy on May 8 were secret. They were deciphered by Captain Remey late at night, and the ship started to sea on the 9th, no one having been informed of the reasons for her sailing. It was not until long after May 13 that it became known that the *Charleston* was cruising in search of the *Itata*. There is not a word of evidence to show that a single member of the Provisional Government was aware of that fact when the letter of May 13 was written. Next, Admiral Brown emphatically states that neither his interview of May 13, nor at any other time, did he make any threats or demands or even requests with reference to the return of the ship. The evidence fails to show from first to last a single demand or threat or even pressure. If such demands or threats had been made, certainly Señor Errazuriz would have been produced as a witness on this point also.

After the interview of May 13, and until the *Itata* was placed at the disposition of the United States, there was no further discussion of the matter between Señor Errazuriz

and the admirals, as the latter "had agreed to say no more on the subject to the authorities, but just to await events," having "perfect confidence that they would carry out their promise."

The claimant bases its argument of duress principally upon the instructions issued by the Navy Department to the *Charleston*, and to the United States ships at that time in Chilean waters. Neither Admiral Brown nor Admiral McCann communicated to the Provisional Government any of these instructions, and as they were not published until incorporated in President Harrison's message in January, 1892, it can hardly be said that they could have influenced the Junta on May 13, 1891.

It was also argued that duress existed from the very fact that it was a case of seventy-eight millions of people against three millions of people, and that the Provisional Government was therefore compelled to give up the ship to the United States. On such a theory it would be impossible for a large nation ever to make even a friendly request of a smaller nation; duress would always exist.

It is urged that certain expressions in Admiral McCann's letter of June 5 to Señor Errazuriz are evidence of pressure, but although the argument is doubtful, it must be observed that when that letter was written the *Itata* had already actually been placed in the possession of the United States. That this delivery of the *Itata* on June 4 was in pursuance of the promise of May 13, there can be no doubt, for in his telegram of June 5 to Mr. Blaine, Señor Errazuriz says:

"*Complying with my written promise*, said steamer, along with the arms and crew, has been placed under charge of Admiral McCann."

It appears, then, that the allegations which, according to the prior Commission, the claimant must prove before it can be entitled to an award, have not been sustained. The *Itata* was not "pursued by the naval authorities upon the

high seas into Chilean waters." The direction given to the *Charleston* to "seize, if on the high seas," was revoked by cable to Panama on May 21. The *San Francisco* and the *Baltimore* did not pursue at all. The burden of the proof is on the claimant, but on the other hand the assumption that the *Itata* was "induced to surrender by a display of superior force and brought back under duress" has been wholly disproved. There can be no doubt that the Junta, speaking through Señor Errazuriz on May 13, "deplore the conduct of the *Itata*, and as an evidence that it is not disposed to support or acknowledge an infraction of United States laws," voluntarily and unasked promised her return "in order that the United States laws interrupted at San Diego may follow their course."

It may be noted that neither the Provisional Government nor upon the success of the revolution the Government *de jure* has ever at any time made any reclamation or protest of any kind against any action of the United States in the matter of the *Itata* from beginning to end.

As soon as the United States marshal at San Diego had resumed possession of the *Itata*, on July 8, a libel was filed against her in the District Court of the United States for the Southern District of California. This libel was based upon a municipal law, upon Section 5283 of the Revised Statutes of the United States, prescribing the forfeiture of "any vessel which is furnished, fitted out, or armed with intent that she shall be employed against any foreign state or people with whom the United States are at peace."

The Junta of Chile, *as claimant of said steamship, admitted that the vessel was in its service*, but denied that the ship was "furnished, fitted out, or armed, etc.," *as alleged in the libel.*

On October 1 the ship was released *to the Government of Chile* (the revolution having been successful), a bond being previously given. On November 4 she arrived at Valparaiso, and on November 10 she was placed by the Government in the hands of the company.

On March 3, 1892, the District Court rendered its decision. It held that the evidence in the case did not constitute a furnishing, fitting out or arming, etc., under the provisions of Section 5283, upon which the libel was based, and that therefore a decree of forfeiture based upon said statute could not be justified.

Upon appeal to the Circuit Court of Appeals the court affirmed the decision of the District Court upon the same grounds. In rendering his opinion the judge stated as follows:

"Forfeiture of the vessel under Section 5283, R. S. U. S., cannot be decreed unless the Government has established by proof the existence of all the facts as to acts and intents essential to bring the case within the purview of the statute."

"Section 5283, Rev. St., does not make the fitting out and arming of a vessel at a port of the United States unlawful unless it be coupled with specified intents or purposes, one of which is that the vessel, after being so fitted out and armed, 'shall be employed * * * to cruise or commit hostilities against the subjects, citizens or property, of a foreign prince, state, colony, district or people. The libel of information in this case charges that certain persons did unlawfully fit out and arm the *Itata* with intent that she should be employed to cruise and commit hostilities against the Republic of Chile.'

"I think that the decision of this court affirming the judgment of dismissal, rendered by the District Court, ought to be placed upon the ground that the vessel was not intended for service against the Republic of Chile." (U. S. v. The *Itata*, 56 Fed. Rep. 518, 519.)

The Supreme Court of the United States has held (the *Three Friends*, 166 U. S. 51) that while this act (5283 R. S. U. S.) is "usually called, by way of convenience, The Neutrality Act, this does not operate as a restriction."

The *Itata* violated other provisions of law by leaving San Diego in the manner disclosed by the evidence, and could have been libeled on other grounds.

Furthermore, the Circuit Court of Appeals in the *Itata* case found that there was *probable cause* for the action against the vessel. Both judges who filed opinions in that case find probable cause in the following language:

Hawley, J., p. 517: "It is true that in this case there were criminating circumstances sufficient to arouse suspicion as to a hostile intent on the part of the *Itata*."

Hanford, J., p. 518: "I consider the seizure of the *Itata* upon the charges set forth in the libel of information in this case to have been justifiable. The circumstances connected with her coming to the port of San Diego and clandestine departure therefrom were not only sufficient to create suspicion, but gave the appearance of an unlawful purpose to be accomplished by the use of said vessel from which there might be resulting complications between our Government and the Republic of Chile. The duty of preventing insurgents and belligerents from using the seaports of this country as places for the fitting out of armed vessels to be employed in acts of hostility towards other countries requires the national authorities to act with promptness and vigor whenever actions or movements of persons or vessels afford reasonable grounds for supposing that a violation of the neutrality laws of the United States is about to be attempted, and the authorities are justified in acting upon appearances."

Señor Aníbal Cruz, the Honorable Agent for Chile, in his brief in the case of Robinson *v.* The Republic of Chile (No. 33), which was dismissed by this Commission unanimously, states in his brief as follows:

"It is, therefore, a well-recognized principle that a government commits a serious breach of international law by allowing its territory to be used as a place from which hostile operations against a friendly State are instituted, and that it therefore becomes the duty of a government to prevent such use of its territory. Since this duty is cast upon a country, international law must recognize the validity of proper means by which the duty is performed, and it is now settled that the means of performance are proper when persons, against whom there are reasonable grounds of suspi-

cion, are proceeded against in accordance with municipal law; if the results of such proceedings show that the suspicions were unfounded in fact, nevertheless no wrong has been done. The decision of the former Commission recognized and applied this rule in the case of Trumbull *v.* United States."

In the case of Ricardo L. Trumbull *v.* The United States, the prior Commission unanimously dismissed the case, and, among other reasons, gave the following:

"We have been unable to find any precedent for this claim. If it is a valid claim, then it would seem to follow that every person charged with an offence against the laws and acquitted may sue the State and recover damages. Every government that institutes a criminal proceeding for the enforcement of its laws would do so at its peril. No government could long exist if such a doctrine should be recognized as sound. The mere statement of the proposition is sufficient to demonstrate its unsoundness. If this were a suit against a private individual for malicious arrest and prosecution, it would be necessary, in order to maintain the suit, to aver and prove malice and want of probable cause. It is not charged in the memorial that the Attorney-General was actuated by malice in ordering the arrest or that there was want of probable cause.

"It is fair to presume that in the performance of an official duty he was governed by the facts and circumstances as they appeared to him. 'A public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion, even although an individual may suffer by his mistake.'
3 Howard, 87; Kendall *v.* Stokes.

"But this is not a claim against the Attorney-General; it is a claim against the United States; *a fortiori* malice and want of probable cause in the arrest and prosecution complained of should be made to appear. Was there want of probable cause? Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of

the prosecutor, that the person charged was guilty of the offence. Were not the facts and circumstances disclosed in the memorial calculated to excite the belief, or at least to warrant the suspicion, that the claimant was engaged in violating the neutrality laws of the United States?"

United States and Chilean Claims Commission, pp. 76, 77.

Mr. Egan, writing to Mr. Blaine on September 17, 1891 ("Message of the President, etc.," p. 74), three weeks after the end of the revolution, and when the Congressional Party was quietly in power, said:

"The more reasonable men of the party in power * * * admit that a mistake was made on the part of some of those who on their behalf were responsible for the transaction (the flight of the *Itata* at San Diego), and that the United States could not consistently have taken any other course than the one she adopted. Mr. Isidoro Errazuriz, when acting as Minister of Foreign Relations two weeks ago, so stated to me without reservation."

It is undoubted that no higher duty rests upon a nation in time of exterior wars or revolutions than that of enforcing neutrality and of forbidding its territory to insurgents as a base of operations. Under such circumstances a nation acting in the interest of a friendly nation is certainly justified by probable cause alone. If the Attorney-General of the United States believed that the *Itata* was about to commit an international wrong, he was not only justified in detaining the ship, but it was his plain duty to do so until the authorities could fully investigate the case.

"Le droit International n'oblige pas seulement les Etats à empêcher que leurs sujets ne portent atteinte à la considération et aux intérêts des peuples et des gouvernements amis; il leur impose encore le devoir strict de s'opposer sur leur territoire à tout complot, à toute machination ou combinaison quelconque de nature à troubler la sécurité des pays avec lesquels ils entretiennent des relations de paix, d'amitié et de bonne harmonie."

Calvo, Vol. III, p. 156.

When the *Itata* entered the waters of the United States the Government was on terms of amity with the Government of Chile. The detention of the ship appears to have been based upon an honest effort on the part of the United States to perform a duty enjoined upon it by the laws of nations—a friendly act which Chile did not protest against or criticise, and a kind of act which it would certainly not protest against or criticise to-day.

The point urged at considerable length by the Special Counsel of the United States in regard to the right, under international law, of the United States, under the peculiar circumstances of this case, to pursue upon the high seas and seize the *Itata* in the territorial waters of Chile, need not be discussed, in view of the above conclusions wherein it appears that the *Itata* was not "pursued upon the high seas into Chilean waters and there seized."

II.

Owing to the conclusions arrived at under the foregoing head (and owing to what will be stated hereinafter) it becomes also unnecessary to enter into the question of the amount of damages actually sustained by the claimant. It may be observed, however, that many of the items claimed are not supported by the evidence. As an instance, a single item may be taken, that of

"Coal consumed on two voyages: 160 days at the rate of 30 tons, daily, making 4,800 tons at 55 shillings per ton, £11,558 6 8."

As stated in the case of the South American Steamship Company against the fisc, in the Supreme Court of Chile, September 2, 1896,

"by the condition stipulated in the eighth subdivision of Article 2 of the last mentioned law (law of February 1, 1888),

it was established that the Government was obliged to pay to the company, whenever it should make use of its vessels, a monthly charter equal to 19 shillings for each ton of net cargo, the company bearing all the expenses of the crew and equipment, *excepting the coal, which was to be paid for by the State.*"

The Provisional Government was certainly making use of the *Itata* when it was sent to San Diego to obtain the arms. It is clear that the Provisional Government (and afterwards the Government) had exclusive possession, management, and control of her. The president and the secretary of the company filed affidavits at Valparaiso to the effect that the vessel, forcibly seized by the insurgents, was at San Diego without their knowledge and consent. That the claimant furnished the coal for the first voyage to San Diego and return is wholly unproved. It seems clear, not only from the law of February 1, 1888, cited above, but also from the facts, that the coal was provided by the Provisional Government. On the way to San Diego the *Itata* furnished large quantities to the man-of-war *Esmeralda*, so that the former was forced to enter San Diego, contrary to the instructions of Trumbull, to obtain more. At that time she was in command of Captain Silva of the *Esmeralda*. On the second trip from Iquique to San Diego, it is conclusively proved that the coal was furnished by the Provisional Government. In the letter of Admiral McCann to Mr. Tracy, dated Iquique, June 13, 1891 (the day the *Itata* left Iquique), the former says: "The authorities here had the ship coaled and provisioned, etc., for sea." When, on July 8th, the libel was filed against the ship, the Junta of Chile, as claimant of said steamship, admitted that the vessel was in its service; and on October 1, when the ship was released, it was released to the Government of Chile, the bond being also given by that Government.

Under such circumstances, and in the entire absence of proof on the part of the claimant that the company fur-

nished the coal as alleged, this item must fall to the ground.

The above item is simply taken as an instance. The others need not be considered.

III.

The fourth paragraph of the claimant's memorial is as follows:

"That no transfer has been made of this claim nor any part thereof; nor has your memorialist received any money or other equivalent or indemnity in satisfaction or part satisfaction therefor, and said claim has never been presented to any of the courts of Chile or of the United States."

The above allegations are not based upon fact. Records of judicial proceedings in Chile (filed as evidence by the United States) show conclusively that in 1896 the South American Steamship Company brought suit against the Government of Chile to recover damages upon the identical claims that are here set up against the United States; that the company recovered judgments for the same against the Government of Chile, and that these judgments have been paid to the company by the Government of Chile.

The records show that the South American Steamship Company, "in a suit against the fisc," made claim for the entire balance due for the services of all the steamers belonging to the company which the Provisional Government or the Government made use of, except of the *Itata*, and for repairs paid for upon all the steamers, including the *Itata*. The unpaid balance constituting the claim—

"Includes the services rendered to the two Governments *de facto* at that time in the country, and includes the charter, repairs, demurrage, equipment, coal, and other minor expenses of the vessel used by both."

It is further stated :

"That in these amounts is not included the sum corresponding to the services rendered by the steamer *Itata*; that an action will be brought against the State subsidiarily only in case the claim brought by the company before the Government of the United States of North America is not favorably decided."

In the reply it is stated "that the fisc does not recognize the right of the company to demand payment for the services of the steamers which were under the direction of the dictatorship."

The evidence in the cause was taken and at the proper time the parties were cited for judgment.

After the following "considerations" judgment was entered :

"Considering that the contracts entered into between the the Government of Chile and the plaintiff company were executed by the former on behalf and for the benefit of the State or the body of persons composing the same.

"Considering that by the civil contest of the year 1891 the unity of the country was divided into two political bodies which governed themselves separately, each of them exercising all the authority of public power in the respective region of territory which it had control of.

"Considering that a political body for whose benefit and interest the contract was entered into being thus divided, it was not possible at that time to decide which of these groups constituted the legal government ; to which is added the fact that it was not possible to refuse the demands of either until the contest was decided.

"Considering that in view of these facts it is not licit for the victorious government to ignore or evade the liability of the defeated government."

Therefore, on December 18, 1897, judgment in the premises was rendered as follows :

Civil decision of the Supreme Court No. 4154.

"South American Steamship Company with the fisc for the recovery of money (pesos).

"Santiago, December 18, 1897. Inasmuch as the parties agree that the undisputed sum to be delivered to the South American Steamship Company is that mentioned by the Director of the Treasury at folio 328 *et seq.*, and the representatives of the company in their conclusion at folio 331.

"In accordance with the provisions of Article 1592 of the Civil Code, it is declared that the amount to be paid at once to the South American Steamship Company is that of forty thousand eight hundred and four pounds sterling, nine shillings two pence, and that of seven thousand one hundred and eighteen pesos and eighty-five cents 'plata fuerte,' from which sums there shall be deducted the amount of forty-eight thousand eight hundred and ten pesos current money, which stands to the credit of the fisc."

This judgment was confirmed on June 24, 1898, and, in the confirmation, a provision requires:

"that upon the final execution of this judgment the amounts which may result in the liquidation of the *Itata* shall be determined."

From this decision an appeal was taken, and this appeal, on August 18, 1898, was overruled, and the judgment of June 24, above referred to, confirmed.

The official record (given in full in the evidence) therefore shows that by a regular suit in court in which both parties appeared, to which voluminous pleadings were filed, and which passed through various phases of pleadings, preliminary judgments, appeals, and final judgments, the company at last recovered a judgment against the Government of Chile for the services of all the steamers except the *Itata*, and for repairs and various other items in connection with all the steamers including the *Itata*.

A suit for special liquidation relating to the services of the *Itata* then followed. The petition states

"that in the decision which appears at folio three hundred and sixty-four, rendered by your excellency on the twenty-

third day of June of this year, ordering the payment to the company of the balance of the liquidation which appears at folio three hundred and sixty, it was declared in the third point that upon the execution of said decision a liquidation should be proceeded with in order to determine the sums resulting in the liquidation of the *Itata*. The payment ordered in said decision having already been made, the time has come to pass upon the liquidation relating to the steamer *Itata* in accordance with the decision rendered."

In a decree dated Santiago, November 15, 1898, it is adjudged as follows:

"In compliance with the foregoing order which requires the liquidation of the special account of the steamer *Itata*, which is pending in the suit which the South American Steamship Company brought against the fisc, the result of which was that the latter was ordered to pay by decisions in first and second instances, which appear at folios 364 and 376, I have proceeded to revise it very carefully, arriving at the same result as the said company, which is as follows:

"Net balance in favor of the company, £12,399,12.4."

In a decree dated Santiago, December 16, 1898, appears as follows:

"It is declared that the fisc must pay to the South American Steamship Company the net balance of twelve thousand three hundred and ninety-nine pounds sterling, twelve shillings and four pence, which appears in favor of said company in the special account of the steamer *Itata*."

The above judgment, "rendered by the Most Excellent Supreme Court," was made final on January 7, 1899, when the final order was issued "Let it be executed."

It is claimed on the part of the memorialist that the payments made by the Government of Chile to the South American Steamship Company are provisional payments; that is to say, they are to be returned to the Government of Chile by the company in case this Commission decides in favor of the memorialist.

This view of the case makes it appear that it is a matter of indifference to the company (which has been paid in full) whether its claim is allowed here or not, and that the real party in interest in this case is actually the Government of Chile.

From all the above considerations it results:

(1) That the damages alleged by the claimant were not occasioned "by any unjustifiable action on the part of the United States;" that the *Itata* was not "pursued by the naval authorities of the United States upon the high seas into Chilean waters, induced to surrender by a display of superior force, and brought back under duress;"

(2) That the *Itata* was voluntarily placed at the disposition of the United States by the Provisional Government of Chile;

(3) That there was probable cause for the detention of the *Itata* at San Diego by the authorities of the United States, and therefore "no wrong has been done;"

(4) That the claimant has brought suit in the courts of Chile against the Government of Chile to recover damages upon the identical claims that are here set up against the United States; that the company has recovered judgments thereon, and that these judgments have been paid to the company by the Government of Chile.

The case must therefore be dismissed.

J. B. PIODA,
The Commissioner for Switzerland.

WM. G. GAGE,
The Commissioner for the United States.

NOTE.—Owing to the fact that the above case was argued only a few days before the expiration of this Commission by limitation, the above opinion has been necessarily confined to a bare exposition of the case, and it is regretted that it has been impossible, owing to lack of time, to elaborate

more fully the various other points involved, both of law and fact, upon which also the above decision is based.

J. B. PIODA,
The Commissioner for Switzerland.
WM. G. GAGE,
The Commissioner for the United States.

Attest:
JOHN F. BAKER,
ELIODORO INFANTE,
Secretaries.

Delivered June 17, 1901.

[A dissenting opinion in this case was prepared by Commissioner Vicuña, but not completed on account of his death.]